IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 508.

JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVERSON, ET AL,

Appellants,

vs.

LYNN J. FRAZIER, ET AL,

Appellees.

APPELLANTS' BRIEF.

N. C. YOUNG,
Fargo, N. D.,

TRACY R. BANGS,
C. J. MURPHY,
Grank Forks, N. D.,
Attorneys for Appellants.

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JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVERSON, L. A. WOOD, NELS NICHOLS, GEORGE SIDENER, EMIL SCOW, W. C. MARTIN, HENRY MCLEAN, GEORGE P. HOMNES, B. W. HERSEY, T. W. BAKER, GEORGE CHRISTENSON, R. H. LEVITT, E. J. MEGEATH, E. A. ANDERSON, S. B. OAKLEY, O. F. BRYANT, GEORGE D. ELLIOTT, JOHN SATTERLUND, P. S. CHAFFEE, ALFRED THURING, J. S. GARNETT, J. E. BAKER, JOHN R. EARLY, H. C. JOHNSON, JOHN C. LEACH, FRED STECKNER, FRED L. ROQUETTE, IVER K. BAKKEN, MICHAEL TOAY, J. L. HARVEY, WILLIAM BURNETT, NATHAN UPHAM, ORLANDO BROWN, J. O. HANCHETT, W. W. WILDE, ARLO ANDREWS, DUNCAN BROWNLEE, W. W. COFELL, E. B. ROSCOE, C. H. KINNEY, on behalf of themselves, and all other taxpayers of the State of North Dakota, *Appellants*,

vs.

LYNN J. FRAZIER, WILLIAM LANGER and JOHN N. HAGAN, acting and pretending to act as the Industrial Commission of North Dakota; LYNN J. FRAZIER, CARL KOZITSKY, WILLIAM LANGER, OBERT OLSON, and THOMAS HALL, acting as the

State Auditing Board; LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY and MINNIE J. NIELSON, constituting and acting as the Board of University and School Lands; OBERT OLSON, as State Treasurer of the State of North Dakota, CARL KOZITSKY, as State Auditor of the State of North Dakota, and LYNN J. FRAZIER, as Governor of said State, WILLIAM LANGER, as Attorney General of said State, JOHN N. HAGAN, as Commissioner of Agriculture and Labor of said State, THOMAS HALL, as Secretary of State of said State, and MINNIE J. NIELSON, as Superintendent of Public Instruction of said State, and LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY, OBERT OLSON, JOHN N. HAGAN and MINNIE J. NIELSON, individually,

Appellees.

APPELLANTS' BRIEF.

STATEMENT OF THE CASE.

This is a taxpayers' suit. The action was brought in the United States District Court for the District of North Dakota, by forty-two resident taxpayers, to enjoin the defendants from diverting the tax funds of that state to private and business purposes; to enjoin them from issuing and selling state bonds and using the proceeds thereof for such purposes; to declare void the legislative Acts of the Sixteenth Legislative Assembly, known as House Bills 17, 18 and 49, and Senate Bills 130, 20, 75 and 19, which in form authorize such ex-

enditures and the issuance of the bonds in ques-on; and to declare void certain amendments to ections 185 and 182 of the North Dakota Con-itution, which purport to have been adopted in 919, and to authorize the legislative Acts above eferred to.

The defendants attacked the Bill by motion to ismiss, under equity rule No. 29. (Tr. pgs. 67, 68, 2, 53, 68 to 71.) The Court sustained the motion s upon a demurrer to the merits, and entered a ecree dismissing the Bill with costs. (Tr. pgs. 82, 3.) The case comes to this Court upon plaintiffs' ppeal from the decree of dismissal. (Tr. pgs. 83, 4.)

The defendants are state officers. They are: Lynn J. Frazier, Governor; John N. Hagen, Commissioner of Agriculture and Labor; William Langer, Attorney General; Carl Kozitsky, State Auditor; Thomas Hall, Secretary of State, and Obert Olson, State Treasurer. (Tr. pg. 2, par. 2.) Each of said defendants is charged with a specific duty in carrying into effect the legislative Acts above referred to. (Tr. pgs. 2 and 3, par. 3, 5, 6, 7.) (Tr. pgs. 8, 9, 10 and 11, par. 19 and 20.)

Minnie J. Nielson, State Superintendent of Public Instruction, and the members of the Board of University and School Lands, were originally named as defendants. Prior to the submission of the case, and by stipulation, the case was dismissed as to her and as to the said Board and all the members thereof. (Tr. pgs. 71-72.)

In the trial court, Governor Frazier and Commissioner Hagen were represented by special counsel. The remaining defendants were represented by the Attorney General and his assistants. (Tr. pgs. 52, 53, 66, 67, 68 and 72.)

The Bill alleges (Tr. pgs. 3 and 4, par. 8 of Bill):

> "That plaintiffs are taxpayers of the State of North Dakota and are owners of both real and personal property in this state, and in the counties of their residence, which is subject to taxation to meet the obligations of the state, and also subject to local taxes. That the plaintiffs, and the other taxpayers of the state of North Dakota are the beneficial owners, subject to the legal and proper use thereof by the state of North Dakota for state purposes, of all moneys and funds now in the Treasury of the state of North Dakota, collected by taxation for the purpose of defraying the expenses of the government of the state, and which funds are held and controlled by the defendants, as officers of the state, as hereinbefore described. That said funds are held in trust by the defendants in their official capacity, for the plaintiffs and the other taxpayers of the state. That said funds now amount to more than three hundred thousand dollars. That from time to time additional sums of money, amounting to hundreds of thousands of dollars each year, raised by taxation against the property of plaintiffs, and the other taxpayers of the state of North Dakota, are being collected and covered into the Treasury of the state, for the purpose of defraying the legitimate expenses of the state government, and the defendants, in their official capacity aforesaid, come into the custody and control of said moneys as the same are collected as hereinbefore set forth. That the State of North Dakota has no moneys, funds, or property, aside

from that collected by the taxation of the property of the plaintiffs and the other taxpayers of the state, except moneys realized from school and institutional lands granted to the state by the United States at the time of admission to the Union. That said school and institutional lands and moneys realized therefrom cannot, under the compact with the United States, be used for any purpose other than the maintenance and support of the schools and institutions of learning of the state and for the purpose of maintaining and supporting other public institutions of the state. That the plaintiffs bring this action as taxpayers on behalf of themselves and on behalf of the other taxpayers of the state who are many thousand in number, and who have a common and general interest in the questions presented in this case, and are so numerous as to make it impracticable to bring them all before the court."

(Tr. page 4, par. 9.) "This is a suit in equity between the plaintiffs and the said defendants, and arises under the constitution and laws of the United States, as hereinafter will more particularly appear; and involves, exclusive of interest and costs, a sum or value in excess of $300,000.00 of moneys now in the Treasury of the state of North Dakota, derived from taxation of property and persons in said state, and $17,000,000.00 in bonds of the state of North Dakota, to be issued as hereinafter set forth, which said bonds, if permitted to issue, create a charge upon the property of the state of North Dakota, which must be met by the taxation of the people and property of said state; and that each of the matters in controversy in this action, exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and that each of said matters arises under the Constitution and laws of the United States."

(Tr. pgs. 4 and 5, par. 10.) "That the defendants, assuming and claiming to act as of-

ficers of the state, and in an official capacity, and under the pretended authority of certain amendments to the state Constitution of North Dakota, which are claimed to have become effective on or about February 1st, 1919, and certain pretended Acts of the Sixteenth Legislative Assembly of North Dakota, which in form took effect on the 26th day of February, 1919, all of which are hereinafter set out, threaten to divert, pay out and transfer, and unless restrained and enjoined by this Court, will pay out, divert and transfer from the general funds of the state, and from the funds of the cities, villages, townships and school districts of the state derived from taxation, and from the permanent school funds of the state, large sums of money in the purchase of the bonds herein referred to and for other unlawful purposes; and threaten to create and issue, and unless restrained and enjoined by this Court, will create and issue, obligations of the state in the form of state bonds, aggregating in amount the sum of $17,000,000.00 for unlawful purposes, and threaten to negotiate and sell, and unless restrained and enjoined by this court, will negotiate and sell said bonds, and will pledge the faith and credit of the state of North Dakota for the payment thereof."

(Tr. pg. 5, par. 11.) "The defendants justify the Acts of which complaint is made in this action by the alleged amendments to the state Constitution approved on or about February 1st, 1919, and the pretended Acts of the Sixteenth Legislative Assembly, approved February 26th, 1919, referred to in paragraph 10 hereof."

(Tr. pgs. 5 and 6, par. 12.) Sets out in full Section 202 of the state Constitution which provides two methods for its amendment. Under one of them, "a majority of the electors qualified to vote for members of the legislative assembly voting thereon" is required for its adoption, whereas, the other method requires

"a majority of all the legal votes cast at such general election."

(Tr. pg. 6, par. 13.) "Prior to February 1st, 1919, Section 185 of the state Constitution was in force and read as follows: 'Neither the state nor any county, city, township, town, school district, or any other political subdivision shall loan or give its credit or make donation to or in aid of any individual, association or corporation except for necessary support of the poor; nor subscribe to or become the owner of the capital stock of any association or corporation; nor shall the state engage in any work of internal improvement unless authorized by a two-thirds vote of the people. Provided, that the state may appropriate money in the Treasury or to be thereafter raised by taxation for the construction or improvement of public highways.'

That on or about February 1st, 1919, the foregoing section was in form amended to read as follows: 'Section 185, Article 12 as amended by Article 18 of the amendment. The state, any county or city may make internal improvements and may engage in any industry, enterprise or business not prohibited by Article 20 of the Constitution (the manufacture and sale of intoxicating liquor), but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation, except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.'"

(Tr. pgs. 6 and 7, par. 14.) "That prior to February 1st, 1919, the state debt limit was fixed by Section 182 of the state Constitution at $200,000, which so far as material, reads as follows:

'The state may, to meet casual deficits or failure in the revenue, or in case of extraordinary

emergencies, contract debts, but such debts shall never in the aggregate exceed the sum of two hundred thousand dollars, exclusive of what may be the debt of North Dakota, at the time of the adoption of the Constitution. * * * No debt in excess of the limit named shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war, or to provide for public defense, in case of threatened hostilities."

"That said Section 182 of the Constitution was in form amended on or about February 1st, 1919, to read as follows:

'Section 182 in Article 12. The state may issue or guarantee the payment of bonds, providing that all bonds in excess of two million dollars shall be secured by first mortgages upon real estate in amounts not to exceed one-half of its value; or upon real estate or personal property of state owned utilities; enterprises or industries, in amounts not exceeding its value, and provided, further, that the state shall not issue or guarantee bonds upon property of state owned utilities, enterprises or industries in excess of ten million dollars. No future indebtedness shall be incurred by the state unless evidenced by bond issue, to be clearly defined. Every law authorizing a bond issue shall provide for levying an annual tax, or make other provisions sufficient to pay the interest semi-annually, and the principal within thirty years from the passage of such law, and shall specially appropriate the proceeds of such tax, or of such other provision for the payment of said principal and interest, and such appropriation shall not be repealed nor the tax or other provisions discontinued until such debt, both principal and interest, shall have been paid. No debt in excess of the limit named herein shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war,

or to provide for the public defense in case of threatened hostilities.'"

(Tr. pg. 7, par. 15.) "That the pretended amendments to Section 182 and 185 of the State Constitution hereinbefore set out, and the Acts of the Legislature of the State of North Dakota, adopted in pursuance and under the pretended authority thereof and referred to herein are void and of no force or validity, for the following reason, among others, to-wit: That said constitutional amendments were submitted and voted upon at the general election held in the fall of 1918, and did not receive a majority of all the legal votes cast at such election."

(Tr. pgs. 7 and 8, par. 16.) "That the sixteenth Legislative Assembly of the State of North Dakota, after in form approving the constitutional amendments hereinbefore referred to, and for the purpose of carrying out the Industrial Program thereunder and therein authorized, passed the following Acts, all of which were declared adopted by sufficient vote to place them in operation on their approval, and which said pretended Acts were approved on February 26th, 1919, to-wit: House Bills 17, 18 and 49 and Senate Bills 130, 20, 75 and 19."

These Acts are set out in full in par. 17 of the bill (Tr. pgs. 8, 21 to 52). A general description of each Act, with reference to the pages of the Transcript where the complete Act will be found, is as follows:

House Bill 17, Tr. pgs. 21 to 24: "The Industrial Commission Act," creates an industrial commission composed of the Governor, Commissioner of Agriculture and Labor, and Attorney General, as a managerial body, to "conduct and manage on behalf of the state, certain utilities, industries, enterprises and business projects," and makes an appropria-

tion of $200,000.00 of the general funds of the state to carry out the provisions of the Act.

House Bill 18, Tr. pgs. 24 to 30: The "Bank of North Dakota Act", charters the Bank of North Dakota and places its management under the Industrial Commission and fixes its capital at $2,000,000.00, all of which is to be provided by the state, and appropriates $100,000.00 to carry the Act into effect.

House Bill 49, Tr. pgs. 31 to 35: The "Bank of North Dakota Bond Act" authorizes the issuance of $2,000,000.00 in state bonds to furnish the capital for the bank and appropriates $10,000.00 to carry the Act into effect.

Senate Bill 130, Tr. pgs. 35 to 40: The "North Dakota Real Estate Bond Act", authorizes the issuance for the Bank's use of $10,000,000.00 in state bonds to furnish a revolving fund, which bonds are to be secured by real estate mortgages, and appropriates $10,000.00 to carry the Act into effect.

Senate Bill No. 20, Tr. pgs. 40 to 42: The "Mill and Elevator Association Act", charters the North Dakota Mill and Elevator Association. Section one of the Act states that its purpose is to "establish a system of warehouses, elevators, flour mills, factories, plants, machinery and equipments, owned, controlled and operated by it." The Act appropriates $118,000.00.

Senate Bill 75, Tr. pgs. 43 to 48: The "Mill and Elevator Association Bond Act", provides for the issuance of $5,000,000.00 in state bonds for the capital stock of the Mill and Elevator Association, which bonds are to be secured upon the industries and business projects owned by the state, and appropriates $10,000.00 to carry the Act into effect.

Senate Bill 19, Tr. pgs. 48 to 51: The "Home Building Act", charters the "Home Building Association," authorizes it to build and sell

farm and city homes, and appropriates $100,000.00 to carry the Act into effect.

(Tr. p. 8, par. 18) alleges: "That the amendments to Sections 182 and 185 of the Constitution, hereinbefore set out, and the Acts of the Legislature set out in the preceding paragraph, purport and pretend to authorize the State of North Dakota to enter into private industries, enterprises, and business projects, such as general banking, buying, selling and handling grain, owning and operating elevators and flour mills, home building, and general real estate loan business, general merchandising, and other business of every character and description."

(Tr. pgs. 8, 9, and 10, par. 19) alleges: That the defendants are now expending and will expend all of the appropriations made by the several Acts, and that unless enjoined that they 'will engage in and undertake all of the different enterprises and business projects specially provided and under the said Acts of the Legislature hereinbefore set forth.' * * *

"That if the defendants herein named are permitted to use the public funds of the State of North Dakota as threatened and herein set forth, a deficit of public moneys and funds required for the purpose of meeting the expenses of the State government will be created, amounting to the sum of the appropriations aforesaid, to-wit, $400,000.00, and that in the event of such deficit, the same would have to be restored by taxation upon the property of the plaintiffs and the other taxpayers of the state."

(Tr. pgs. 10 and 11, par. 20.) That unless enjoined, the defendants will issue and negotiate the bonds in question and create a liability against the State, "which said liability can only be met and liquidated by moneys raised by taxation against the people and property of the State of North Dakota, and which

moneys thus raised and said liability thus created will be for a private business enterprise, and contrary to, and in violation of the rights of these plaintiffs and all other taxpayers in the State of North Dakota, and in violation of the fundamental principles of a Republican form of government and the Constitution of the United States."

(Tr. pgs. 11 and 12, par. 21.) "That the bonds authorized by the Acts of the Sixteenth Legislative Assembly, referred to herein, would be invalid, for the following reasons:

(a) Because issued for private business, and not for public purposes;

(b) For the reason that they would violate the Constitution of the State of North Dakota in this: That no sufficient provision is made in said Acts for a sinking fund to meet and pay the principal of the bonds to be issued under said Acts, as required by Section 182 of the State Constitution.

(c) For the reason that the legislature did not exercise its function of fixing the amounts, denominations, maturities and rate of interest on said bonds, but on the contrary attempted to delegate the legislative function of fixing and determining the same to the discretion of the Governor and the Industrial Commission."

(Tr. pgs. 12 and 13, par. 22.) "That the purpose of the proposed expenditure of public funds and the creation of public debts of which these plaintiffs complain, is not a public or a governmental purpose, but is a private or business purpose, and is for the purpose of financial profit and gain for those who are interested in the various industries and enterprises and business projects proposed to be installed. That such enterprises do not rest upon the public health or welfare of the people of the State or any other governmental reason which would justify the proposed expenditures or the creation of the proposed debts or in any manner

come within the taxing or police power of the state. That no condition exists in the State of North Dakota which will authorize or justify the State, in the exercise of its legitimate functions of government, in engaging in the various lines of private business contemplated as aforesaid, under the said constitutional amendments and Acts of the Legislature, or in making the proposed expenditures or incurring the proposed debts. That the facilities now provided for supplying the people of the State of North Dakota with the necessities and luxuries of life, and conveniences and requirements for their comfort, welfare and health are adequate."

"North Dakota has an area of 79,837 square miles, and a population, according to the war census, of 664,625. It has 53 counties, each of which is served by one or more of six railroads, whose total mileage, including main line and branch line trackage, is 6,295 miles."

"On the lines of its several railroads are more than 250 incorporated cities and villages, and numerous unincorporated hamlets, and all together more than one thousand railroad stations or sidings where freight and merchandise is loaded and unloaded, with numerous privately-owned general stores where merchandise and food products, including flour, and all the necessities of life, are kept for sale, and sold."

"It has 74 flour mills in operation, which are scattered over the various parts of the state, with a capacity varying from 25 to 1800 barrels per day; and a total capacity of 16,720 barrels a day, or 5,000,000 barrels capacity for a year. The mills thus privately owned and operated have the capacity of producing between seven and eight times more flour than the people of North Dakota consume, and a capacity not only to feed all the people of the State, but still have for export to other states

or countries, over four million barrels per year."

"It has more than 2,000 licensed and privately owned warehouses and elevators located at railroad stations in the several counties of the state, with a total capacity for storing grain, of more than 60,000,000 bushels."

"It has 706 state and national banks, with capital stock and surplus ranging from $10,000 to $560,000."

"It also has a large number of loan and trust companies and numerous loan agencies, specializing in making of loans on farm lands, said individual loan agencies being distributed throughout the state, and in each and every county thereof. It also has a great number of building and loan associations specializing in making loans upon city property."

"North Dakota has an area of 40,000,000 acres, more than half of which is unbroken prairie, and used for grazing and stock raising."

"The principal occupation of the rural population of this State is that of grain growing, dairying and stock raising."

"That a large proportion of the taxpayers of the State of North Dakota, who are the owners of a large part of the taxable property of the State, are in no manner interested in any of the business enterprises or projects authorized and provided for by the legislative Acts here in question."

(Tr. pg. 13, par. 23.) "That if the state of North Dakota were permitted to engage in the various enterprises, industries and projects hereinbefore referred to, the plaintiffs and the other taxpayers of the State, in whose behalf this suit is brought, will suffer irreparable injury and damage, and will become involved in a multiplicity of suits. That the plaintiffs and said other taxpayers will be denied the equal

protection of the law, and will be deprived of their property without due process of law, all in violation of their rights as citizens of a free government, and in violation of the guaranties of the Fourteenth Amendment to the Constitution of the United States. That they will be denied the protection of Section 4, Article 4 of the Constitution of the United States, guaranteeing to each state and the citizens thereof, a Republican form of government. That the protection of the guarantees of the Constitution of the United States, referred to, is now claimed by the plaintiffs in their own behalf, and on behalf of all other taxpayers of the State. That these plaintiffs, and those in whose behalf this suit is prosecuted, have no adequate remedy at law."

(Tr. pgs. 14 to 20.) In addition to the injunctional relief asked, the plaintiffs pray that the constitutional amendments and the legislative Acts in question, making the appropriation of public funds, and authorizing the bond issues, be declared illegal and void.

MOTION TO DISMISS BY SPECIAL COUNSEL.

(Tr. pgs. 52 and 53.) On April 7, 1919, counsel for Governor Frazier and Commissioner Hagen, filed a motion to dismiss, stating the following grounds:

> "(1) Because it appears in the complaint filed in this cause that there is insufficiency of fact to constitute a valid cause of action in equity against these defendants or any of them, and that said complaint fails to allege facts constituting such cause of action."
>
> "(2) Because it appears in the complaint filed in this cause that this Honorable Court has no jurisdiction of the subject matter of the pretended cause of action set forth in said complaint."

(Tr. pg. 67.) The motion was noticed for hearing on April 25, 1919.

MOTION TO DISMISS BY ATTORNEY GENERAL.

(Tr. pgs. 53 to 66.) On the return day, to-wit: April 25, 1919, the Attorney General filed an answer on behalf of the defendants represented by him, and also submitted a motion to dismiss on the following grounds:

(Tr. pgs. 67, 68.) "First: The Court is without jurisdiction to hear and determine this action because:

(a) The Bill of Complaint shows on its face that it is in effect an action against the sovereign State of North Dakota and fails to show that the State of North Dakota has consented to be sued in this action.

(b) The Bill of Complaint fails to show that the matter in controversy, or cause of action, alleged therein, arises under the laws or the Constitution of the United States.

(c) The Bill of Complaint fails to show that the interests of any one of the plaintiffs in the matter in controversy exceeds in value the sum of three thousand dollars ($3,000.00) and shows that the plaintiffs form a class of parties who have relation to the common fund sought to be administered.

Second: That there is a non-joinder of parties defendant to this action, for the reason that the Bill of Complaint on its face shows that the State of North Dakota is the real party defendant, and the State of North Dakota is not made a party defendant to the action and said State cannot be made a party defendant.

Third: That the Bill of Complaint does not state facts sufficient to constitute a valid cause of action in equity."

AMENDED MOTION TO DISMISS BY SPECIAL COUNSEL.

(Tr. pgs. 68 to 71.) Thereafter, and on May 2nd, 1919, Special Counsel for Frazier and Hagan filed what is called "An Amended Motion to Dismiss." The grounds for dismissal stated in this "Amended Motion" are identical with those stated in their original motion and hereinbefore set out. This Amended Motion invokes in its support facts which are extrinsic to the bill of complaint and in contradiction of the allegations thereof and entirely outside of the record. After repeating the grounds of the former motion, this "Amended Motion" states:

> "The said motion is made upon the bill of complaint and all the files and proceedings herein and upon all matters of which said court will take notice, including, among others, certain matters of fact, to-wit".

This is followed by 19 subdivisional references to various statutes, concurrent resolutions, constitutional amendments, election returns, of which the Court is asked to take notice. Subdivisions 12 and 14, Tr. page 70, read as follows:

> "12. In 1916 and 1918 the Republican platform upon which the present state administration was elected both times by an overwhelming majority, advocated unequivocally rural credit banks, state-owned terminal elevators, and flour mills, packing plants, etc."
>
> "14. During the primary and general elections of 1916 and 1918 the principal issues in the campaigns were the building and operation by the State of terminal elevators, flour mills,

packing plants and other public utilities, state hail insurance, and rural credit banks."

DECREE.

On June 14th, 1919, a decree was entered dismissing the bill with costs and an opinion was filed which will be found on Tr. pgs. 72 to 83.

(Tr. pg. 84.) To remove any doubt which might arise from the language of the opinion as to whether the decree was upon the merits, the Court in allowing the appeal from the decree stated, that "the Court passed and intended to pass on the merits."

SPECIFICATIONS OF ERROR.

1.

"The Court erred in granting defendants' motion to dismiss the action."

2.

"The Court erred in holding that the amount in controversy in this action does not exceed the sum of three thousand dollars."

3.

"The Court erred in holding that the constitutional provisions and statutes of North Dakota, set out in the Bill, do not violate the Fourteenth Amendment to the Federal Constitution."

4.

"The Court erred in entering the decree dismissing this case."

ARGUMENT.

We contend that the Court erred in granting the defendants' motion and in entering a decree dismissing our bill.

The motions presented several grounds for dismissal. They went in part to the jurisdiction of the Court, and in part to the merits of our cause of action.

It is our contention that none of the grounds referred to in the court's opinion, and none of the grounds stated in the motion to dismiss, justify the dismissal.

THE PLAINTIFFS, AS TAXPAYERS, HAVE A RIGHT TO MAINTAIN THIS ACTION.

Neither of the motions to dismiss challenge the right of the plaintiffs, as taxpayers, to maintain this action. However, the views expressed by the trial judge in his opinion, (Tr. pgs. 75 and 76), make it necessary to consider the question before taking up the several grounds of dismissal stated in the motions. The trial judge states in his opinion (Tr. pg. 73, par. 1), that "they, (the plaintiffs) assert that the suit is brought on behalf of the state, to protect it against the unconstitutional use of its funds, and an unconstitutional issue of bonds." And after explaining that the Fourteenth Amendment does not protect the state, as such, says, "it

necessarily results that plaintiffs in this suit represent only themselves," and (Tr. pg. 76), "it may be doubted whether taxpayers may maintain a suit against the state officials to vindicate the alleged rights of a state, * * * I can find no justification for extending the doctrines to actions against state officers."

The court's statement as to the capacity in which the plaintiffs bring this action, and the statement of what they claim, is wholly erroneous. The plaintiffs do not claim to represent the state, and they are not before the court as individuals. They bring this suit as taxpayers, and they represent the taxpayers of the state in this suit.

It has already been seen that this is strictly "a taxpayers' suit." The object of the action is to enjoin the unlawful diversion of public funds by the defendants and to enjoin them from issuing and negotiating bonds, and using the proceeds thereof for unlawful purposes, and to declare void, the constitutional amendments and legislative Acts which purport to authorize the things which they threaten to do. The bill of complaint alleges, (Tr. pg. 4), "that the plaintiffs bring this action as taxpayers, on behalf of themselves and on behalf of the other taxpayers of the state, who are many thousand in number, and who have a common and general interest in the questions presented in this case, and are so numerous as to make it impracticable to bring them all before the court."

The courts of this country whose function it is to see that there shall be no wrong without a remedy, have recognized and established by repeated decisions, the right of a taxpayer to challenge the validity of the acts of public officers which affect the general tax burden; and further, that one or more taxpayers may, on behalf of themselves and other taxpayers, challenge the validity of acts which affect the taxpayers generally. Manifestly, it is impossible for all taxpayers to join in such an action. In this case, forty-two taxpayers, a fairly representative number, are named in the bill as plaintiffs, suing on behalf of themselves and the other taxpayers of the state. They are scattered over the state and in its various counties. They allege that they "are many thousand in number * * * and are so numerous as to make it impracticable to bring them all before the court."

This is in harmony with the provisions of Rule 38 of the Rules of Practice of the Courts of Equity of the United States, 198 Fed. XXIX, which reads as follows:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

The equitable principle embodied in this rule has been recognized in Courts of Equity both in England and in this country. In Smith v. Swormstedt, 16 Howard, 298, 302, 303, the court sustained

the right of a number of superannuated Methodist ministers, as complainants, to prosecute a suit on behalf of themselves and all other ministers of the same class, to recover their share of a fund amounting to $200,000. The Court said:

> "The rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others; * * * In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried. Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained."

The rule is statutory in North Dakota. See Sec. 7406, Compiled Laws of North Dakota, 1913.

The reasons which sustain the right of a taxyer to maintain such actions as this are dissed by Judge Dillon in

2 Dillon's Municipal Corporations, Third Edition, Sec. 914 to 922.

We quote from Sections 914 and 915 as follows:

"Sec. 914 (731). In this country, the right of property holders or taxable inhabitants to resort to equity to restrain municipal corporations and their officers from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers, such as making an unauthorized appropriation of the corporate funds, or an illegal disposition of the corporate property * * * has been affirmed or recognized in numerous cases in many of the states. It is the prevailing doctrine on this subject. It can, perhaps, be vindicated upon principle, in view of the nature of the powers exercised by municipal corporations and the necessity of affording easy, direct and adequate preventive relief against their abuse. It is better that those immediately affected by corporate abuses should be armed with the power to interfere directly in their own names than to compel them to rely upon the action of a distant state officer."

"Sec. 915. 'The doctrine of the preceding section is supported by an analogy supplied by the settled rule of law applicable to private corporations. In a private corporation the ultimate cestui que trust are the stockholders. In a municipal corporation the cestui que trust are the inhabitants embraced within its limits.'"

The rule thus stated by Judge Dillon was expressly approved by the United States Supreme Court in Crampton v. Zabriskie (1879) 101 U. S.

601. That case has been followed and quoted, without criticism, in both federal and state courts as the leading case upon the subject, and the rule there stated has become the settled law in this country.

In Crampton v. Zabriskie, supra, the court said:

> "Of the right of resident taxpayers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the state courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property-holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the state or county, there would seem to be no substantial reason why a bill by or on behalf of the individual taxpayers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases. Those who desire to consult the leading authorities on this subject will find them stated or referred to in Mr. Dillon's excellent treatise on the Law of Municipal Corporations."

"The Liberty Bell," 23 Fed. 843, was decided upon the authority of Crampton v. Zabriskie. In that case, a taxpayer of New Orleans, but a citizen of France, sustained his bill against the City of New Orleans and prevented the use of public funds to pay junketing expenses connected with a return of the Liberty Bell to Philadelphia. We quote from the opinion:

> "Resident taxpayers have the right to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of a municipal corporation or the illegal creation of a debt which they, in common with other property holders, may otherwise be compelled to pay."
>
> "There is no doubt that the said ordinance makes an appropriation of the funds of the City of New Orleans derived from taxation for purposes wholly beyond the purview of municipal government; is a wrongful appropriation of the *funds held in trust for the taxpayers* and people of New Orleans to pay the alimony and legitimate expense of the City; and is, in short ultra vires, illegal, null and void. See Acts La. 1882, No. 20, pp. 20. 21 Secs. 7, 8; 1 Dill. Corp. Sec. 52 et seq; Hood v. Lynn, 1 Allen, 103; Tash v. Adams, 10 Cush. 252; Claflin v. Hopkinton, 4 Gray, 502; Murphy v. Jacksonville, 18 Fla. 318; Grant Co. v. Bradford, 72 Ind. 455; Henderson v. Covington, 14 Bush, 312; Cornell v. Guilford, 1 Denio, 510; Hodges v. Buffalo, 2 Denio, 110; Halstead v. Mayor, etc., of New York, 3 N. Y. 433; New London v. Brainard, 22 Conn. 552."
>
> "The illegality and nullity of the ordinance being clear, the question remaining for decision is as to the jurisdiction and propriety of an injunction in this particular case. 'In this country, the right of property-holders or taxable inhabitants to resort to equity to re-

strain municipal corporations and their officers from transcending their lawful powers, or violating their legal duties, in any mode which will injuriously affect the taxpayers,—such as making an unauthorized appropriation of the corporate funds, or an illegal disposition of the corporate property, or levying and collecting void and illegal taxes and assessments upon real property, under circumstances presently to be explained,—has been affirmed or recognized in numerous cases in many of the states. It is the prevailing doctrine on this subject. Dill. Mun. Corp. Sec. 731."

"In New London v. Brainard, 22 Conn. 552, which was a case of injunction to restrain appropriation to celebrate the Fourth of July, the Supreme Court of Connecticut, in holding that a citizen and taxpayer is entitled to an injunction to restrain an illegal appropriation of the money of the city, said, in substance, that it is so because the city corporation holds its moneys for the corporators to be expended for legitimate corporate purposes; and a misappropriation of these funds is an injury to the taxpayer, for which no other remedy is so effectual or appropriate. See Dill. Sec. 732 et seq., for the many cases sustaining this doctrine."

(The court then quotes from Crampton v. Zabriskie, the part we have already quoted).

In Colorado Paving Co. v. Murphy, C. C. A., 8th Ct., 78 Fed. 28, the court said:

"That taxpayers, whose taxes are to be increased and whose property is to be depreciated in value by the fraudulent or arbitrary violation of this provision (an ordinance requiring contracts to be let to lowest bidder), by the officers of a municipality, may maintain a bill to enjoin their proposed action, is

a proposition now too well settled to admit of question. Times Pub. Co. c. City of Everett (Wash.) 37 Pac. 695; 1 Beach, Pub. Corp. Secs. 634, 635; 2 Dill. Mun. Corp., Sec. 922; 2 High, Inj., Secs. 1251, 1253; Davis v. Mayor, etc., 1 Duer, 451; Crampton v. Zabriskie, 101 U. S. 601; Mayor, etc. v. Keyser, 72 Md. 106, 19 Atl. 706; People v. Dwyer, 90 N. Y. 402."

In Davenport v. Buffington, C. C. A. 8th Ct., 97 Fed. 234, the court held that:

> "A resident and taxpayer of a city or town may maintain a suit in equity to prevent the diversion to private use by the original proprietor of the town site of land which, when the town was laid out and platted, was dedicated as a public park, and has since been maintained as such."

It was held in the above case that Tarrant, a general taxpayer, was a proper party to the action, and jurisdiction of the court was sustained upon that ground. We quote from pages 236 and 237:

> "If these parks are appropriated to private use, he and his family will be deprived of their use to promote their health, recreation, and amusement. In short, the sale of the parks, and their use by the vendees for their private purposes, will deprive the appellee Tarrant of his share in the valuable right of the people to use them for park purposes, will deprive him and his family of a source of health, recreation, and amusement, and *will be very likely to increase the burden* of his taxation by compelling him to pay a part of the purchase price of other parks bought to replace those destroyed. Now, the enforcement of trusts is one of the great heads of equity jurisdiction. The land in these parks, if it was really dedicated to the use of the public for park purposes, is held in trust for that use, and courts

of equity always interfere at the suit of a cestui que trust or a cestui que use to prohibit a violation of the trust, or a destruction of the right of user. The appellee Tarrant is one of the cestui que use for whom these parks are held in trust, and the inevitable conclusion is that his interest in them is ample to enable him to maintain a suit in equity to prevent their diversion to private uses. Thus, in Scofield v. School Dist. 27 Conn. 499, it was held that a resident and taxpayer of the district had sufficient interest to enable him to maintain an injunction to prevent the use of the school house for religious services. The court very pertinently said that the value of the right of the district and its inhabitants to the exclusive use of the school house for school purposes was not to be measured by the mere pecuniary injury resulting from an infringement of the right. To the same effect is the decision of the supreme court of Kansas in Spencer v. School Dist., 15 Kan. 259, in which the opinion was delivered by Judge Brewer. Indeed, under the modern decisions, the general rule is that a resident taxpayer of a municipality has sufficient interest, and has the right to maintain a bill to prevent the unlawful disposition of the money or property of his town or city, to forbid the illegal creation of a debt or liability of his municipality, and to restrain the diversion of money or property in his town or city from any public use in which he shares to which it has been dedicated. Crampton v. Zabriskie, 101 U. S. 601, 609; Mayor, etc., v. Gill, 31 Md. 375, 395; Spencer v. School Dist., 15 Kan. 259; Scofield v. School Dist., 27 Conn. 499; Christopher v. Mayor, etc., 13 Barb. 567, 571; Stuyvesant v. Pearsall, 15 Barb. 244; De Baun v. Mayor, etc., 16 Barb. 392; Sharpless v. Mayor, etc., 21 Pa. St. 147, 158; Moers v. City of Reading, Id. 188; City of New London v. Brainard, 22 Conn. 552; Merrill v. Plainfield, 45 N. H. 126."

The right of taxpayers as such to maintain an action to have a proposed bond issue declared invalid was recognized without challenge by this court in Brown v. Trousdale, 138 U. S. 389. The rule as to the right of taxpayers to maintain a suit such as this, as stated and applied in Crampton v. Zabriskie, 101 U. S. 601, has, we believe, never been challenged or criticised.

See Larrabee v. Dolley, 175 Fed. 365, 386.

Quinton v. Equitable Investment Co., 196 Fed. 314.

Murray v. City of Alleghany, C. C. A. 3 Ct. 136 Fed. 57-61.

It is also quoted, with approval in Volume I, Pomeroy's Equitable Remedies, Sec. 344, and is further supported by a list of cases from thirty-one states, which have followed it, including North Dakota. So thoroughly is the rule established in North Dakota that in the recent "friendly case" Green, et al., v. Frazier, et al., 176 N. W. 11, involving the validity of the legislative Acts which are attacked in the present action, and brought by only four taxpayers, all from the same County, and in which the defendants are the same State Officials who are named as defendants in the case at bar, and were represented by the same counsel, no question of the right of the four taxpayers to maintain that action on behalf of themselves and the other taxpayers of the State was raised. It seems hardly probable, therefore, that counsel for defendants in this action will challenge the right

of the forty-two taxpayers who are named as plaintiffs to maintain the same on behalf of the taxpayers of the State, or that they will undertake to support the objections urged by the trial judge in his opinion against the maintenance of the action against State officers. There is nothing in the grade of the officers who are attacked, which affects the right of the taxpayers to maintain their action. They have a right to maintain their action because they are taxpayers, and because defendants, under some pretended authority, threaten to do acts which will injuriously affect them as taxpayers.

Indeed, a taxpayer, because of his peculiar and personal interest, is the real party in interest in determining the validity of governmental action, and as such, has a superior standing because of that fact. This was illustrated in Crawford v. Gilchrist (Fla.) 59 So. 963, a case in which the Governor of Florida, in his capacity of a taxpayer, as well as Governor, enjoined the Secretary of State from certifying to the electors certain proposed amendments. On the subject of his right to maintain the action, the court said:

> "A resident taxpayer has the right to enjoin the illegal creation of a debt which he, in common with other property holders and taxpayers, may otherwise be compelled to pay. Peck v. Spencer, 26 Fla. 23, 7 South. 642; Lanier v. Padgett, 18 Fla. 842; Crampton v. Zabriskie, 101 U. S. 601, 25 L. Ed. 1070."

The Governor of the State, the Attorney General, and other officers of the State, who are named

as defendants are engaged in doing unlawful acts. The taxpayers of the State have, therefore, no redress at the hands of their regularly elected officers. On our theory of this case, the officers to whom they have delegated authority to protect them, have failed them. The taxpayers of the State are the real parties in interest because they are contributing and will contribute from their private funds all the moneys which are involved in the suit. To say that they cannot maintain an action under such circumstances is to say that they are without remedy, and must submit to any and all usurpations of authority by those who happen to hold official positions.

We will now consider the grounds of the Motions which attack the jurisdiction of the Court.

THIS ACTION IS NOT AGAINST THE STATE IN FORM OR EFFECT, AND THERE IS NO DEFECT OF PARTIES BECAUSE THE STATE IS NOT MADE A DEFENDANT.

In the motion for dismissal filed in the court below on behalf of certain of the defendants, and in the argument below on behalf of all of the defendants, it was contended that this action is against the sovereign state of North Dakota, and as the State cannot be sued without its consent, therefore the court was without jurisdiction and the action should be dismissed. We assume that the same claim will be made in this court. Upon this contention we desire to offer the following suggestions:

Whenever a public official, be he national, state or municipal, refuses to perform a duty imposed upon him by law, or attempts to act without authority of law, any person aggrieved may invoke the power of the court against such delinquent officer. Such an action cannot be considered as being against the governmental agency of which the defendant happens to be an officer. The official, in such case, is stripped of the dignity and power of his office, and acts simply as an individual without actual authority, but claiming pretended authority. He is a wrong-doer. His action or non-action, as the case may be, is unlawful. He thereby violates the rights of those whom he was selected to represent and protect, and an injunction is the proper remedy. The principles of law we are attempting to state are clearly illustrated in the case of School of Magnetic Healing v. McAnnulty, 187 U. S. 94. There the question was as to the legality of the action of the Postmaster General in forbidding to the plaintiff the use of the mails for transmitting letters advertising plaintiff's business. It was held that under the facts admitted in the record the Postmaster General had no authority under the law to make the order complained of. The Court said:

> "The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts,

therefore, must have power in a proper proceeding to grant relief; otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the persons whose letters are withheld."

It was claimed that as the conduct of the post office is a part of the administrative department of the Government, the courts had no jurisdiction to grant relief to a party aggrieved by the action of the head or of the subordinate officials of that department, even though such action might be unauthorized by the statute under which he assumed to act. This contention was denied.

In the case at bar the plaintiffs claim that the constitutional amendment authorizing the State of North Dakota to engage in any private business which an individual might undertake, and tax the citizens of the state to defray the expenses of such private business is violative of the federal constitution. That the business provided for by the acts of the legislature complained of is private business, and that therefore these acts are in violation of the fourteenth amendment to the federal constitution. If under the issues in this action, as they now stand, our allegations must be accepted as true, and we claim that they stand admitted upon the record, then it clearly appears that the defendants, in their respective departments as alleged in the complaint, are acting and contemplate acting ille-

gally and without authority of law. They cannot claim that in what they are doing or intend doing they merely represent the State, or that they are in effect the State, and therefore immune from regulation by the courts. They stand as naked wrongdoers, stripped of their official authority and amenable in the courts to those whom their unlawful acts may injure. Of course, if our contention that the rights of the plaintiffs under the federal constitution would be violated if the defendants were permitted to operate under the amendment of the state constitution and statutory enactments set forth in the complaint is erroneous, and the State may lawfully engage in these various businesses and tax its citizens to maintain them, then the action must fail. That however, is a different question to that which we are now considering.

The question is never—what is the rank and station of the offending officers. The question always is—are the officers, who are charged with exceeding their authority, legally justified in what they are doing, or threatening to do. In such cases, the attack is not upon the State, or municipality, but is upon the acts of the officials, who under the apparent sanction of legislative or municipal authority, are doing or threatening to do, illegal acts.

It appears that the defendants, because of the official positions occupied by them, are charged with the carrying out of the program provided for in the acts of the legislature involved, and it is admitted that they will do their part unless enjoined by the Court. The governor, attorney general and

commisisoner of Agriculture and Labor, are designated in House Bill 17 as the "Industrial Commission," and as such are given general management, charge and supervision of the expenditure of funds in the inauguration and establishment of the business program proposed, and of the business after it has been started. (Tr. 3).

The defendants, Frazier, Langer, Olson and Hall constitute the "Auditing Board," and they are required to audit all bills and allow or disallow the same. (Tr. 2). This audit is required to be made before bills are paid. Defendant Olson as the State Treasurer, is custodian of all state funds, and is required to pay all bills presented to him which have been certified and approved for payment. (Tr. 3).

Defendant Kozitsky, as State Auditor, is required to prepare and draw warrants upon the State Treasurer for the payment of all moneys out of the state treasury. (Tr. 3). The defendants, Olson, as State Treasurer, Frazier, as Governor, Hall, as Secretary of State, and Kozitsky, as State Auditor, are required to prepare for issue, execute, issue, certify and attest the state bonds provided for in the various acts aggregating seventeen million dollars. These bonds are then to be delivered to the defendants constituting the "Industrial Commission" for negotiation and sale. (Tr. 31, 36, 44).

The defendant Frazier, as Governor, calls all meetings of the "Industrial Commission." He is made chairman of the "Industrial Commission." The defendant Langer, as Attorney General, is

made legal advisor of the "Industrial Commission." (Tr. 21).

The defendants, Frazier, as Governor, Langer as Attorney General, Kozitsky, as State Auditor, Olson, as State Treasurer, and Hagen, as Commissioner of Agriculture and Labor, constitute the State Board of Equalization, (Sec. 2141, Rev. Codes, N. D. 1913) and as such board are required annually to levy taxes sufficient to pay interest upon the seventeen million dollars of bonds authorized by the acts of the legislature involved in this case. (Tr. 33, 29 and 46). These bonds are to bear interest at a rate not exceeding six per cent per annum. (Tr. 31, 36, 44).

It will thus be seen that the taxpayers of the State may be required to contribute annually over a million dollars in interest alone, although there is further provision for the application of the profits, if any, of the business engaged in upon this interest obligation.

From this resume it appears that each and all of the present defendants, individually and in the respective official capacities in which they pretend and threaten to act, are concerned in the carrying out of the program provided for in these various acts, and they are each and all parties to the illegal transactions and expenditure of public funds raised by taxation complained of, and which the plaintiffs seek to prohibit. Therefore, according to our understanding, the case is brought squarely

within the principle laid down in the following decisions.

In the case of Pennoyer v. McConnaughy, 140 U. S. 1, the Court first referred to suits which would be considered as against the State, and then made a very clear statement with reference to suits which would not be considered against the State, saying:

> "The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the State."

This suit was against certain officers of the State of Oregon who comprised the Board of Land Commissioners of the State, to enjoin them from selling certain lands of the State which the plaintiff claimed title to. The defendants claimed the right to make sale under a statute of Oregon which the plaintiff claimed was not constitutional. Many prior decisions of the court were reviewed, and the Court said that:

> "The general doctrine of Osborn v. Bank, 9 Wheat. 738, that the Circuit Courts will re-

> strain a state officer from executing an unconstitutional statute of the state, when to execute it would violate the rights and privileges of the complainant which had been guaranteed by the Constitution, has never been departed from."

The doctrine of the last case cited was referred to with approval in the case of Reagan v. Farmers Loan and Trust Co., 154 U. S. page 362. In this case the question of the validity of transportation rates was involved, and the action was brought against the officers of the State of Texas who were charged with the enforcement of the rates. It was held that the State had no such interest in the questions involved as would justify the holding that it was the real party in interest, the court saying:

> "There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well-being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment. Not a dollar will be taken from the treasury of the State, no pecuniary obligation of it will be enforced, none of its property affected by any decree which may be rendered. It is not nearly so much affected by the decree in this case as it would be by an injunction against officers staying the collection of taxes, and yet a frequent and unquestioned exercise of jurisdiction of courts, state and Federal, is in restraining the collection of taxes, illegal in whole or in part."

In the case of Smyth v. Ames, 169 U. S. 466, the syllabus states:

> "A suit against individuals for the purpose of preventing them as officers of a state from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of the Eleventh Amendment."

This was a suit to restrain the enforcement of alleged confiscatory transportation rates. The defendants were the state officers of Nebraska who had the duty of enforcing the rates under the laws of Nebraska.

The case of M. K. & T. Ry. Co. v. Missouri Railroad and Warehouse Commissioners, 183 U. S. 53, was, as the title indicates, against state officers of Missouri charged with the enforcement of transportation rates in Missouri. Removal of the case from the state to the federal court was contested upon the ground that the State of Missouri was the real defendant, but this contention was overruled.

The suit of Scott v. Donald, 165 U. S. 58, was against the defendants named as state constables of the State of South Carolina, to recover for the seizure and taking of certain liquors of the plaintiffs upon the ground that the law of South Carolina under which said seizure was made, was unconstitutional. The defendants claimed that inasmuch as they represented the State in making the seizure, the State was the real party in interest, and that the suit was against the State. The first

paragraph of the syllabus disposes of this claim as follows:

> "Where a suit is brought against defendants who claim to act as officers of a state and under color of an unconstitutional statute commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the State, or for compensation for damages, such suit is not an action against the State within the meaning of the Eleventh Amendment to the Constitution of the United States."

In Ex parte Young, 209 U. S. 123, it appeared that the Attorney General of the State of Minnesota had been arrested for undertaking to enforce the penalties of a law that had been passed by the legislature fixing transportation rates, the enforcement of which had been enjoined in a suit against such officer. It was contended that the injunctional suit was in effect against the State, and without jurisdiction. This question was considered thoroughly and the decisions reviewed at great length. It would seem that the rule there enunciated is so plain that no question would again be raised upon a similar state of facts. The following quotation from the syllabus explains fully the conclusion reached by the court:

> "The attempt of a state officer to enforce an unconstitutional statute is a proceeding without authority of, and does not affect, the State in its sovereign or governmental capacity, and is an illegal act and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to

its officer immunity from responsibility to the supreme authority of the United States."

Again:

"While making a state officer who has no connection with the enforcement of an act alleged to be unconstitutional a party defendant is merely making him a party as a representative of the State, and thereby amounts to making the State a party within the prohibition of the Eleventh Amendment, individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence an action, either civil or criminal, to enforce an unconstitutional statute, may be enjoined from so doing by a federal court."

The case of Herndon v. Ry. Co., 218 U. S. 135, was against certain state officers as defendants to prevent them from attempting to enforce a statute of Missouri requiring trains to make certain stops, the claim being that the statute was unconstitutional. The court cited Ex parte Young, supra, and Western Union Telegraph Co. v. Andrews, 216 U. S. 165, as settling the question conclusively that the suit could not be considered as one against the State.

The case of Philadelphia Co. v. Stimson, Secretary of War of the United States, 223 U. S. 605, was to enjoin the defendant from causing criminal proceedings to be instituted against the plaintiff because of the reclamation and occupation of its land outside the prescribed limits. The plaintiff claimed in that case that the action of the defendant constituted the taking of its property for a

public use without compensation. While this contention was not sustained by the Court, the rule as to when a suit must be considered as brought against the sovereignty, and when it will be considered as being against officers of a sovereignty who are acting or who threaten to act beyond their authority, was clearly defined. It was there said:

> "Exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. In case of injury threatened by illegal action, an officer of the United States cannot claim immunity from injunctive process. An officer transcending the limits of his authority under a constitutional statute may inflict similar injuries on property or individuals *as though he were proceeding under an unconstitutional statute, and in either event*, equity may intervene to restrain unfounded prosecution."

To the same effect see the case of Home Telephone & Telegraph Co. v. City of Los Angeles, 227 U. S. 278, where it was said:

> "One, whose rights protected by a provision of the federal constitution which is identical with the state constitution, are invaded by state officers claiming to act under a state statute, is not debarred from seeking relief in the Federal court under the Federal Constitution until after the state court has declared that the acts were authorized by the statute."
>
> "Under the Fourteenth Amendment the Federal judicial power can redress the wrong done by a state officer misusing the authority of the State with which he is clothed; under such circumstances inquiry whether the State has authorized the wrong is irrelevant."

In the case of Truax and the Attorney General of the State of Arizona v. Raich, 239 U. S. 33, it is said that:

> "A suit against officers of the State who are about to proceed wrongfully to complainant's injury in enforcing an unconstitutional statute is not a suit against the State within the meaning of the Eleventh Amendment. While, generally speaking, a court of equity has no jurisdiction over prosecution, punishment or pardon of crimes or misdemeanors, equity may, when such action is essential to the safeguarding of property rights, restrain criminal prosecutions under unconstitutional statutes."

The above suit involved the constitutionality of a statute of Arizona which provided that those employing more than five workers at one time, should employ not less than eighty per cent qualified electors or native-born citizens of the United States, and providing penalties for violation of the act. The suit was to restrain the prosecuting officers of the State from enforcing the law.

The case of Little v. Tanner, Attorney General of the State of Washington, 240 U. S. 369, was to enjoin the defendant from enforcing the statute of Washington imposing license tax upon the privilege of using profit-sharing coupons and trading stamps, upon the ground that the law interfered with and burdened interestate commerce, impaired the obligations of contract, denied equal protection of the law, and deprived the plaintiff of his property without due process of law. In the court below a motion was made to quash a temporary restraining

order that was issued, the defendant claiming exemption from suit on the ground that the same was against officers of the state to prevent them from enforcement of the criminal laws of the state, "and was therefore a suit against the State in violation of the Eleventh Amendment to the constitution of the United States." The lower court overruled this motion and on appeal to this court the ruling of the court below was approved.

In the case of Greene, Auditor, et al., constituting the Board of Valuation and Assessment for the State of Kentucky, v. Louisville & Inter Urban Railway Company, et al., 244 U. S. 499, the rule sustained by the former decisions which we have cited was re-affirmed.

The latter decision was followed in the case of Louisville & Nashville Railway Co. v. Greene, Auditor of Public Accounts, et al., individually and as constituting the Board of Valuation and Assessment for the State of Kentucky, 244 U. S. 522, the first paragraph of the syllabus in this case reading as follows:

> "That the federal court has power to decide all questions, its jurisdiction being properly invoked on federal grounds; that this suit, to restrain subordinate state officers from enforcing an unlawful and discretionary assessment made under the color of a valid state law, is not a suit against the State."

The first two paragraphs of the syllabus in the case of Greene, Auditor, et al., v. Ry. Co., supra,

concisely states that ruling of the court. We quote the same:

> "Equity has jurisdiction to enjoin unlawful tax proceedings, which cloud the plaintiff's title and threaten irreparable injury and a multiplicity of suits. The principle settled in Ex parte Young, 209 U. S. 123, to the effect that a suit to restrain state officials from enforcing an unconstitutional state statute in violation of plaintiff's rights and to his irreparable damage is not a suit against the State, applies also when the statute itself is constitutional, but the attempted administration of it is not."

In Looney v. Crane Co., 245 U. S. 178, it was said:

> "A suit to enjoin state officials from enforcing an unconstitutional tax is not a suit against the State."

In disposing of this question in the above case the Court used the following language:

> "There is a contention to which we have hitherto postponed referring—that the court below was without jurisdiction because the suit against the state officers to enjoin them from enforcing the statute in the discharge of duties resting upon them was in substance and effect a suit against the State within the meaning of the Eleventh Amendment. But the unsoundness of the contention has been so completely established that we need only refer to the leading authorities."

In the case of Johnson v. Lankford, Bank Commissioner of Oklahoma, 245 U. S. 541, it was claimed that the suit must be considered as against the State. Recovery was sought for the loss of plaintiff's bank deposit, due to the failure of the Bank

Commissioner to safeguard the business and assets of the bank, and his arbitrary, capricious and discriminating refusal to pay the claim or allow it as against the State Guaranty Fund, all in continuous, negligent and wilful disregard of his duties under the state statute. The suit was held not to be against the State.

The case of Martin v. Lankford, State Bank Commissioner of Oklahoma, et al., 245 U. S. 547, was similar to the prior case above referred to, and the same holding as to the suit not being against the State was made.

CASES RELIED UPON BY DEFENDANTS DISTINGUISHED.

The error of counsel for defendants in this case in claiming that the action must be considered as against the State of North Dakota, is due, we believe, to their failure to properly distinguish the authorities upon which they rely from the decisions of this court that are applicable to the facts in the case at bar. This distinction is clearly pointed out in the case of Hopkins v. Clemson College, 221 U. S. 636. The Court said:

> "With the exception named in the constitution, every state has absolute immunity from suit. Without its consent it cannot be sued in any court by any person for any cause of action whatever. And looking through form to substance, the Eleventh Amendmant has been held to apply, not only where the State is actually named as a party defendant on the record, but where the pro-

ceeding, though nominally against an officer, is really against the State, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer which seeks to compel him to exercise the State's power of taxation; or to pay out its money in his possession on the State's obligations; or to execute a contract, or to do any affirmative act which affects the State's political or property rights. * * * But immunity from suit is a high attribute of sovereignty—a prerogative of the State itself—which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. To grant them such immunity would be to create a privileged class free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law. For how can the principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual defendants whenever they interpose the shield of the State? The whole frame and scheme of the political institutions of this country, state and federal, protest against extending to any agent the sovereign's exemption from legal process. The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers. If they were indeed agents, acting for the State, they—though not exempt from suit—could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted. But if it appeared that they proceeded under an unconstitutional statute their justification failed and their claim of immunity disappeared on the production of the void statute."

Even the Supreme Court of North Dakota, in Green et al. v. Frazier, 176 N. W. 11, has approved the right of taxpayers to bring suit against the same defendants as are designated in this action, in which suit the validity of the statutes here involved were *ostensibly* questioned. The case is that of Green, et al., v. Frazier, as Governor, et al., already referred to.

One of the cases relied upon by counsel for defendants is that of Louisiana v. Jumel, 107 U. S. 711. In that case it appeared that the holders of certain state bonds sought to compel the state officers of Louisiana to pay the interest coupons, and that taxes had been levied and collected for such purpose. The plaintiffs in that action were not taxpayers and had no interest other than creditors of the State, and were simply seeking to compel the execution of a contract that had been entered into with the state. They had no authority to bring the suit against the State of Louisiana, and sought to compel specific performance of the contract by a suit against the general officers of the state. It was held that this could not be done. The distinction between such a case and the one at bar is obvious. Here we have certain individuals who are occupying and are given official positions and duties to perform under the acts of the legislature complained of. They are about to expend for illegal purposes the moneys collected by taxation and incur obligations which the taxpayers will have to meet in the future. No effort is being made in this action to compel the carrying out of a contract or

obligation imposed upon the State of North Dakota; on the contrary, the action is to prevent the officers named from wrongfully paying out moneys and contracting obligations which would be prejudicial to the State, but so far as the plaintiffs are concerned they are not basing their right to maintain this action because prejudice will result to the State. It is the damage that will accrue to the plaintiffs and those whom they represent, the taxpayers of the state, that constitutes the grounds for the relief asked,

In the case of Cunningham v. Ry. Co., 109 U. S. 446, the situation was the same as in the case of Louisiana v. Jumel, supra.

To compel state officers to take affirmative action in behalf of or carrying out contracts or obligations of the State is an entirely different proposition to that of restraining individuals who occupy the position of state officials, from taking action under unconstitutional laws which will result in loss and dissipation of funds raised by taxation and which will result in the creation of obligations that will have to be met by taxation. The present action comes within the latter class of cases, and is to prevent, not to compel, action by state officials.

The case of Belknap v. Schild, et al., 161 U. S. 10, was for an infringement of letters patent granted by the United States for an improvement in caisson gates. It was alleged that the defendants,

officers of the United States Navy stationed in California, had manufactured and used, and intended to use caisson gates in carrying on the government business in violation of the rights of plaintiff. It was held that "Officers or agents of the United States, although acting under order of the United States, are personally liable to be sued for their own infringement of a patent." But it is quite clear that the court considered that the United States was the real party in interest and not the individual officers sued, because the property involved was owned by the United States and if it was being used in violation of the patent rights of plaintiff it was the United States who was the offender, not the naval officers who made incidental use of the property in the ordinary course of their duties. We call attention to the following language:

> "In the present case, the caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in place by the United States, and was the property of the United States, and held and used by the United States for the public benefit. If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States. The United States, then, had both the title and the possession of the property. The United States could not hold or use it, except through officers and agents. Although this suit was not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction, and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire

interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; the United States were the only real party, against whom alone in fact the relief was asked, and against whom the decree would effectively operate; the plaintiff sought to control the defendants in their official capacity, and in the exercise of their official functions, as representatives and agents of the United States, and thereby to defeat the use by the United States of property owned and used by the United States for the common defence and general welfare; and therefore the United States were an indispensable party to enable the court, according to the rules which govern its procedure, to grant the rleief sought; and the suit could not be maintained without violating the principles affirmed in the long series of decisions of this court, above cited."

The facts in the foregoing case clearly distinguish it from the case at bar. The property involved was the absolute property of the United States. If acquired or used in violation of the plaintiff's rights the United States was the offending party. The case was similar to one that might be brought to determine title to real estate vested in the United States. In these circumstances administrative or executive officers cannot be named as defendants, and thus the objection that the suit is against the sovereign eliminated. In the case at bar, the money involved was raised by taxation against the plaintiffs and those whom plaintiffs represent, and they have a beneficial interest in the funds involved. The defendants are officers of the State charged with the carrying out of the provisions of the laws claim-

ed to be unconstitutional. It is universally held that taxpayers have the right to bring suit to enjoin the dissipation of funds raised by taxation, and such suit may properly be brought against the officers who are about to make the illegal expenditure. Again, in the present case it must always be borne in mind that plaintiffs seek to prevent the issuance of bonds aggregating large amounts, and which the taxpayers will be called upon to meet by future taxation.

The case of International Postal Supply Company v. Bruce, 194 U. S. 601, was a suit against a postmaster to prevent the use of a machine for cancelling stamps and postmarking letters, it being claimed that plaintiff was the owner of letters patent upon such machine. The machines had been hired by the Post Office Department for a term of years, not yet expired. Itwas held that the suit was in effect against the United States and could not be maintained. The United States was in this case, as in the last case referred to, the real party in title and interest. It was held that the case was governed by Belknap v. Schild, supra.

The case of Oregon v. Hitchcock, Secretary of the Interior of the United States, and William A. Richards, Commisisoner of the General Land Office of the United States, 202 U. S. 60, was to restrain the defendants from allotting or patenting to Indians or other persons certain lands within the limits of the Klamath Reservation, which it is alleged were on March 12, 1860, swamp and over-

flowed lands, and asking a decree establishing the title of the State of Oregon to such lands, and declaring that the title to such lands was subject to such right of temporary and terminable occupation as may exist in the Indians at that time occupying the reservation, and not to be defeated by any allotment, patent, agreement, or other arrangement. The defendants claimed that the United States was the real party in interest, and it was held that—

> "The fact that the action was brought by a State against the Secretary of the Interior, who is a citizen of a different State, does not give this court jurisdiction, as the real party in interest is the United States."

It was further held that:

> "It is not the province of a court to interfere with the administration of the Land Department, and until the land is patented, inquiry as to equitable rights comes within the cognizance of the department and the courts will not anticipate its action."

The court called attention to the fact that the title to all the land was in the United States Government. It is apparent that there could be no lawful adjudication with reference to the title to this property without the real owner, the United States, being a party to the action. In such a case it would be a mere subterfuge to permit an action to be brought against officials of the United States.

The case of Wells v. Roper, First Asisstant Postmaster General, 246 U. S. 335, involved rights under a contract by whom the plaintiff was to furnish automobiles for handling the mail at Washington.

The contract contained a clause authorizing cancellation upon ninety days' notice. Notice of cancellation was given and the action was brought to restrain the annulling of the contract and require performance of the same. It was held to be a suit against the government and not maintainable. That the effect would be to oblige the United States to accept continued performance of the contract, and directly interfere with one of the processes of government. It was held that the bill of complaint showed that the defendant was without personal interest, was acting solely in his official capacity and within the scope of his duties. That it could not be claimed that any question of defendant's official authority was involved. The question was whether or not the contract, which the defendant in his official capacity undertook to cancel, could be enforced, and whether the United States was liable for a breach thereof.

It will be noted that in the motion to dismiss the point is also made that there has been a nonjoinder of parties defendant, in that the State is the real party in interest and has not and cannot be joined. The contention has, we believe, been fully met and answered by the authorities which we have already cited upon the right of the plaintiffs to maintain this action. If the action is maintainable against the officers named, and is not in effect a suit against the State, then of course it must follow that the State is not a necesary party.

THIS CASE ARISES UNDER THE CONSTITUTION OF THE UNITED STATES.

One ground of the Attorney General's attack upon the court's jurisdiction is the following:

> (Tr. pg. 68 (b).) "The bill of complaint fails to show that the matter in controversy, or cause of action, alleged herein, arises under the laws or constitution of the United States."

All of the parties to this action are residents of the State of North Dakota. The jurisdiction of the court rests upon Section 24 of the Judicial Code. So far as material, it reads as follows:

> "Sec. 24. The District Court shall have original jurisdiction as follows: First. Of all suits of a civil nature at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States * * *."

As applied to this case, this section requires three things to establish jurisdiction: (1) the suit must be "of a civil nature at common law or in equity." (2) "The matter in controversy" in the suit must exceed, exclusive of interest and costs, the sum or value of three thousand dollars. (3) The matters in controversy must arise under the Constitution or laws of the United States.

We are now dealing with the question of the jurisdiction only. The question here is not, whether our claim shall be sustained. The question is, whether we shall be heard,—in other words, do we

present a claim which is fairly debatable, or is our claim so frivolous and groundless that we should not be given a hearing. The rule which is applicable is stated by this court in Illinois Central Railroad v. Chicago, 176 U. S. 646, 656, as follows:

> "In determining the existence of a Federal question it is only necessary to show that it is set up in good faith and is not wholly destitute of merit."

See also:

> Walsh v. Columbus, etc., Railroad Co., 176 U. S. 469-475-476.

The plaintiff taxpayers present in their bill three claims under the Federal Constitution.

First: The bill alleges that the appropriation and use of the tax funds of the State, and the issuance of State bonds, and the use of the proceeds thereof for the purposes stated in the seven legislative Acts in question, violate the fundamental rights of the plaintiffs, as citizens of a free government. (Tr. page 11.) To show that this claim has merit, we rely upon Loan Association v. Topeka, 20 Wallace, 665, in which bonds issued under legislative authority, in aid of an industrial enterprise and not for public purposes, were held void, without referring to any specific provision of the Federal Constitution. We quote from this case:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which

recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism.. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all limited and defined powers.

There are limitations on such power which grow out of the esential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name." The Court held that, "Among these is the limitation of the right of taxation, that it can only be used in the aid of a public object, an object which is within the purposes for which governments are established."

The above case was followed by others, none of em referring to the Fourteenth Amendment.

Cole v. La Grange, 113 U. S. 1.

Parkersburg v. Brown, 106 U. S. 487.

Burlington Twp. v. Beasley, 94 U. S. 310.

Blair v. County, 111 U. S. 363

Osborne v. Adams County, 106 U. S. 181.

Osborne v. Adams County, 109 U. S. 1.

See also:

Dodge v. Township, C. C. A. 8th Ct., 107 Fed. 827.

Beach vs. Bradstreet, 82 Atl. 1030 and cases cited.

Second: We also claim that these plaintiffs will be denied the protection of Section 4, Article 4 of the United States Constitution which guarantees to each state, a Republican form of government. We contend that the program established by the two amendments to the State Constitution, and the seven legislative Acts here in question, is not the Republican form of government guaranteed by the Federal Constitution. In support of this claim, we quote from Beach v. Bradstreet, Conn. (1912) 82 Atl. 1030:

> "A Republican form of government forbids the raising of taxes for any but public purposes, and under Section 4, Article 4, of the Constitution of the United States, Connecticut is forever bound to maintain such form of government, and cannot exercise legislative power inconsistent with it."

And on the strength of this conclusion, the court held that "A Republican form of government forbids the raising of taxes for any but public purposes."

Pacific States Tel. Co. v. Oregon, 223 U. S. (1911), 118, is referred to as settling the question that the section of the Constitution, which guarantees a Republican form of government presents

a political question only which is solely cognizable by Congress, and not a judicial question. It is true, in that case the question was a political one. However, the court pointed out, on Page 150 of the opinion that the attack made upon the law was not made by those who had been denied any constitutional rights, and said: "If such questions had been raised they would have been justicable and therefore would have required the calling into operation of judicial power." The attack was addressed to the framework and political character of the State government. Whether the case at bar can be distinguished is not important for, clearly, the plaintiffs have the same right of protection under the Fourteenth Amendment.

Third: We also contend, and this is our chief contention, that the Constitutional amendments and legislative Acts here in question e void under the Fourteenth Amendment to the Federal Constitution, which so far as revelant, reads as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person, within its jurisdiction, the equal protection of the laws;"

Our bill shows that under the pretended authority of the Legislative Acts in question, the property of plaintiffs and the other taxpayers of the State

is being taken, and will be taken under the guise of taxation, for private and business purposes. Such a taking is without due process of law. It is the settled law of this country that the right of taxation can only be used in aid of a public object,—an object which is within the purposes for which governments are established. This will be fully discussed elsewhere. To show that our claim has substantial merit and is not frivolous, we cite:

Loan Association v. Topeka, 20 Wallace, 655;

Dodge v. Township, C. C. A. 8th Ct. 107 Fed. 827.

Lowell v. Boston (1873), 111 Mass. 453; 15 Am. Rept. 39.

Allen v. Jay (1872), 60 Maine, 124; 11 Am. Rept. 185.

In Re: Opinion of Justices (1910) Mass. 98 N. E. 611.

It was not contended in the lower court, and probably will not be contended here that the case does not rise under the Federal Constitution. Further, the trial Judge, although he held against our contention upon the merits, treated it as arising under the Fourteenth Amendment.

THE MATTER IN CONTROVERSY EXCEEDS THE SUM OR VALUE OF $3,000, EXCLUSIVE OF INTEREST AND COSTS.

The Attorney General's Motion further urged:

(Tr. pg. 68 (c)), "The bill of complaint fails to show that the interests of any of the plaintiffs in the matter in controvery exceeds in value the sum of Three Thousand Dollars, and shows that the plaintiffs form a class of parties who have relations to the common fund sought to be administered."

The foregoing presents an objection to the court's jurisdiction only indirectly. It does not make the direct challenge that the sum or value of the matter in controversy does not exceed the sum of $3,000, exclusive of interest and costs. The language of Section 24 of the Judicial Code is very plain on this element of jurisdiction. That Section gives jurisdiction "where the matter in controvery exceeds exclusive of interest and costs, the sum or value of $3,000."

The question in every case is, what is the "matter in controversy," and does it exceed the sum or value of $3,000. This question in this case must be answered by an examination of the allegations of the Bill.

The bill alleges:

(Tr. Pgs. 3 and 4, Par. 8) "That the plaintiffs and other taxpayers of the state of North Dakota are the beneficial owners, subject to the legal and proper use thereof by the State of North Dakota for state purposes, of all moneys

and funds now in the treasury of the State
North Dakota, collected by taxation for
purpose of defraying the expenses of the
ernment of the state, and which funds are
and controlled by the defendants, as officer
the state, as hereinbefore described. That
funds are held in trust by the defendants
their official capacity for the plaintiffs and
other taxpayers of the state. That said fu
now amount to more than three hundred th
sand dollars."

The bill further alleges:

(Tr. Pg.4. Par. 9) that the suit, "involv
exclusive of interest and costs, a sum or va
in excess of $300,000. of moneys now in
treasury of the State of North Dakota, deri
from taxation of property and persons in
state, and $17,000,000 in bonds of the St
of North Dakota, to be issued as hereinbef
set forth, which said bonds, if permitted
issue, create a charge upon the property of
State of North Dakota, which must be met
the taxation of the people of and property
said state; and that each of the matters in c
troversy in this action, exceeds, exclusive
interest and costs, the sum or value of th
thousand dollars."

The plaintiffs, speaking for the taxpayers
North Dakota, claim in this action that the
constitutional amendments which are set out
the bill are void to the extent that they author
the state to go into business generally, and i
the particular business described in the se
legislative acts in question; further, that each
these seven legislative acts are void, and they
to have the amendments and legislative acts
judged to be void. They also ask that the bo

which are authorized by said acts to be adjudged void, and that the defendants be restrained from paying out the moneys appropriated by the several acts.

We submit that the matters in controversy in this action are the seven legislative acts and the two constitutional amendments, and the proposed bond issues authorized by the said acts; further that the sum or value of the matters in controversy is the amount of the appropriations and the bond issues. Measured in terms of money, these are the amounts which are directly affected by the decree. As the case stands, the decree of the trial court sustains these appropriations and the bond issues. The appropriations and the bond issues represent the amount which will be added to the burden of the taxpayers of North Dakota, if the decree is sustained.

What do the defendants claim? Their claim is that the several acts in question do not violate the Federal Constitution and that they are valid and fully justify the defendants in doing the several acts which the plaintiffs seek to enjoin.

It is clear if the plaintiffs' contentions are sustained in full, each of the several legislative acts which we attack, including the several appropriations and the authorization for the $17,000,000 in bond issues will be declared void; and the two constitutional amendments will be sustained or restricted according to the court's views.

If plaintiffs' contentions are sustained as to only a part,—that is, as to one or more of the acts, our relief will be confined to the act or acts which are held void, but even in that event, the "amount in controversy" will sustain the court's jurisdiction, for in each act, the amount in controversy is in excess of the amount required to establish jurisdiction. The decree will necessarily affect the public moneys in the Treasury which amount to over $300,000, and the proposed bond issues aggregating $17,000,000.

If our contentions are sustained, the $300,000 in the Treasury will be used for governmental purposes; and if they are overruled, it will be expended under the provisions of the legislative acts which we attack. So, too, in the case of the bonds, if our contentions are sustained, they will not create a State indebtedness; if we are overruled, they will create a State indebtedness, and become a legal obligation on the taxpayers of the State.

The case at bar belongs to the class of cases which are represented by Brown v. Trousdale, 138 U. S. 389. That case, like this, was strictly a taxpayer's suit. The plaintiffs in that case, as in this case, sued as taxpayers on behalf of the other taxpayers of the taxing jurisdiction. The purpose of their action was to have a county bond issue of $400,000 declared void. The same question as to the amount in controversy, which is involved in this case, was raised and presented in that case, and the court held that the matter in dispute was

the bond issue. We quote from the opinion as follows:

"The main question at issue was the *validity of the bonds* and that involved the levy and collection of taxes for a series of years to pay interest thereon and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county, as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs, each claiming under a separate and distinct right, in respect to a separate and distinct liability and that contested by the adverse party, is not applicable here. For although as to the tax for the particular year, the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appellees in that regard."

The rule stated in the above case was quoted and applied in Northern Pacific Railway Company v. Pacific Coast Lumber Manufacturers' Association, C. C. A. 9th Ct. 165 Fed. 1-11, and was quoted in Risley v. City of Utica, C. C. A. 8th Ct., 168 Fed. 737. It was also quoted understandingly, and without criticism in Wheless v. City of St. Louis, 96 Fed. 865-869.

In Northern Pacific Railway Company v. Pacific Coast Lumber Mfg. Co., supra, a number of corporations and persons joined in a suit to enjoin the Northern Pacific Railway Company from putting into effect a new schedule of rates. On the question of the matter in controversy, we quote from Page 11 of the opinion.

> Objection is made to the jurisdiction on the ground that it does not appear from the bill that the necessary jurisdictional amount is in controversy. The bill alleges that the matter in controversy exceeds, exclusive of interest and costs, the sum and value of $2,000. In Wetmore v. Rymer, 169 U. S. 115, 18 Sup. Ct. 293, 42 L. Ed. 682, it was held that a suit cannot properly be dismissed by a Circuit Court as not involving a controversy of an amount sufficient to come within its jurisdiction unless the facts appear upon the record to create a legal certainty of that conclusion. In Lee v. Watson, 1 Wall. 339, 17 L Ed. 557, it was said: By 'matter in dispute' is meant the subject of the litigation—the matter for which the suit is brought and upon which issue is joined, and relation to which jurors are called and witnesses examined. The matter in dispute in the present suit is the right of appellants to enforce a proposed schedule of rates. Railroad Co. v. Ward, 2 Black, 485, 17 L. Ed. 311. In principle the case is similar to Washington Market Co. v. Hoffman, 101 U. S. 118, 25 L. Ed. 782, a suit in which a number of complainants whose several interests did not equal the jurisdictional amount sought to enjoin the market company from interfering with their right to occupy their respective stalls. The court said:—'The case is one of two hundred and six complainants suing jointly. The decree is a single one in favor of them all and in denial of the

right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable.' In Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308, 34 L. Ed. 987, the complainants were taxpayers who sought to restrain the collection of interest and principal on bonds alleged to have been unlawfully issued by the county. The court said: 'The rule applicable to plaintiffs each claiming under a separate and distinct right in respect to a separate and distinct liability and that contested by the adverse party is not applicable here.' So in City of Ottuma v. City Water Supply, 119 Fed. 315, 56 C. C. A. 219, 59 L R A 604, in a suit by a taxpayer to enjoin the city from issuing bonds, it was held that the power of the city to issue such bonds is the matter in dispute for the purpose of ascertaining the amount or value in controversy, and not the tax to which the complainant would be subjected. Other cases in point are Texas & P. Ry. Co. v. Kuteman, 54 Fed. 548, 4 C. C. A. 503; American Fisheries Co. v. Lennen (C. C.) 118 Fed. 869."

In City of Ottuma v. City Water Supply, C. C. A. th Ct., 119 Fed. 315, it was held:

"In a suit by a taxpayer to enjoin a city from issuing bonds, claimed to be in excess of the constitutional limit of its indebtedness, the power of the city to issue such bonds is the matter in dispute for the purpose of determining whether the amount or value in controversy is sufficient to give a federal court jurisdiction, and not the tax to which complainant would be subjected."

That case was prosecuted by a single property wner and taxpayer to invalidate a contract for ater works. The court stated that the records howed that the plaintiff would be injured in an

amount sufficient to sustain jurisdiction, but nevertheless held that the matter in dispute was the power of the City to make the contract and issue bonds. We quote:

> "But the city of Ottuma was about to enter into the proposed contract for the erection of waterworks, and issue and nogotiate bonds of the city as proposed to the amount of $398,900 to procure money to pay for the same. Complainant contends that the city, being already indebted beyond the constitutional limit, has no right or power to enter into such contract or issue such bonds. Whether it has or has not such power to issue and nogotiate that large amount of bonds is certainly the matter in dispute in this suit, brought to restrain and prohibit the city from taking such action. Johnston v. City of Pittsburg, (C. C.) 106 Fed. 753; Rainey v. Herbert, 5 C. C. A. 183, 55 Fed. 443; Market Co. v. Hoffman, 101 U. S. 112, 25 L. Ed. 782; Railroad Co. v. Ward, 2 Black, 485; 17 L. Ed. 311; Stinson v. Dousman, 20 How. 461, 15 L. Ed. 966; Scott v. Donald, 165, U. S. 107, 114, 17 Sup. Ct. 262, 41 L. Ed. 648."

Johnson v. City of Pittsburg, 106 Fed. 753, which was an action in equity in the Federal Court by a taxpayer to enjoin the city of Pittsburg from making a contract and from paying moneys thereunder, and asking that the contract be surrendered for cancellation, it was claimed that the jurisdictional amount was not involved; that the complainant's property was worth only $3500; that the contract of sale was less than $300,000, and that the total valuation of the city's property was $270,000,000 for which reason the plaintiff's taxes, when levied, could not amount to $2,000. The court,

aking through Buffington, Judge, overruled this ection, holding that the value of the contract l not the amount of the tax, was the sum or ount in controversy. We quote the following m the opinion in this case:

"It will thus be noted the only question now before us is one of jurisdiction,—whether the requisite jurisdictional amount is involved. After careful consideration we are of opinion this plea must be overruled. The bill does not seek to enjoin the levy of a proposed tax, or restrain collection on one levied. True, it is averred complainant is a property owner and taxpayer; but this is evidently done to show he is not an intermeddler, and on the theory that such facts give him a standing to file a bill to question the legality of the contract. If the prayers of the bill were granted on final hearing the asphalt company would be deprived of a contract far in excess of the required jurisdictional sum. If this asphalt company was a respondent in a bill filed in a state court, the prayer of which was to strike down such a contract, manifestly its right of removal to a Federal court, if otherwise proper, could not be denied by reason of the allegation that the matter in controversy was the amount of taxes the complainant would have to pay if the contract were performed. The principle applicable to the present case is set forth in Mayor, etc. of Baltimore v. Postal Tel. Co. (C. C.) 62 Fed. 500, where it is said:

'It is true that where a bill in equity is filed to abolish a nuisance, or to set aside a deed, or for a decree giving other mandatory or preliminary relief, it is the value of the property of which the defendant may be deprived by the decree sought which is the test of jurisdiction, and not the claim of the complainant.'

This principle underlies Market Co. v. Hoffman, 101, U. S. 113, 25 L. Ed. 782, where the value of the right, the exercise of which was

enjoined, was held to be the test of jurisdiction; Railroad Co. v. Ward, 2 Black 485, 17 L. Ed. 311, where, in a bill to abate a public nuisance, it was held the value of the obstruction, and not the damage to the plaintiff, was the matter in controversy; Stinson v. Dousman, 20 How. 461, 15 L. Ed. 966, where it was held the title to the land, and not the rent sued for, was the matter in controversy; Rainey v. Herbert, 3 U. S. App. 600, 5 C. C. A. 183, 55 Fed. 443, where, on a bill to abate a private nuisance the value of the respondent's use of a projected coking plant, the use of which was sought to be enjoined, was held to be the matter in controversy and to sustain jurisdiction; Whitman v. Hubbell (C. C.), 30 Fed. 81, where, on a question of jurisdiction, it was said 'The matter in dispute is the value of the right to maintain the awning, not the amount of damage done by it to the plaintiff.' To these may be added Dickinson v. Trust Co. (C. C.) 64 Fed. 895; Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co. (C. C.) 43 Fed. 547; Symonds v. Greene (C. C.) 28 Fed. 834. The plea is overruled with leave to the respondents to answer within 30 days."

In Davies v. Corbin, 112 U. S. 36, a writ of mandamus was sought on behalf of several persons who held judgments against Chicot County, to compel the levying of a ten mill tax to pay the several judgments. None of the judgments in amount, equaled the jurisdictional amount. A motion to dismiss on jurisdictional grounds was presented. The court on this point said:

"The second objection is, to our minds, equally untenable. The writ which has been ordered in this case is not like that in Hawley vs. Fairbanks, 108 U. S. 543, to compel the levy of taxes to pay separate and distinct judgments in favor of several relators, who, for

convenience and to save expense, united in one suit to enforce their respective rights, but to compel a tax collector to collect a single tax which has been levied for the joint benefit of all the relators, and in which they have a common and undivided interest. As in the cases of Shields v. Thomas, 17 How. 3, 5 and the Connemara, 103 U. S. 754, all the relators claim under one and the same title, towit: the levy of a tax which has been made for their benefit. They have a common interest in the tax, and it is perfectly immaterial to the tax collector how it is divided among them. He has no controversy with them on that point; and if there is any difficulty as to the proportions in which they are to share the proceeds of his collections, the dispute will be among themselves and not with him. He cannot act upon separate instructions from the several creditors. His duty is to collect the tax for the benefit of all alike. A payment of the judgment of one creditor would not relieve him from his obligation to collect the whole tax. The object of the proceeding is, not to raise the sums due the relators but to raise the whole tax on ten mills on the dollar. As the matter stands, each relator has the right to have the whole tax collected for the purpose of distribution among all the creditors. It is apparent therefore, that the dispute is between the tax collector on one side and all the creditors on the other, as to his duty to collect the tax as a whole for division among them, after the collection is made, according to their several shares. The value of the matter in dispute is measured by the whole amount of the tax, and by the separate parts into which it is to be divided when collected. It is conceded that the amount of the tax is more than $5,000."

In Troy Bank v. Whitehead & Company, 222 U. S. 39, several persons who held notes secured

by a single vendor's lien united to enforce it. No one of them had a sufficient amount involved to give jurisdiction. A motion to dismiss was granted. This was reversed by the Supreme Court. We quote the following from the opinion of Judge Van Deventer:

> "By the demurrer to the bill the defendant challenged the jurisdiction of the Circuit Court, upon the ground that the matter in dispute was not of the requisite jurisdictional value; and the court, being of opinion that such value was not to be measured by the extent to which the plaintiffs collectively were seeking to enforce the lien as a common security, but by extent to which each was interested in its enforcement, sustained the demurrer and dismissed the bill for want of jurisdiction. 148 Fed. Rep. 932. The plaintiffs then appealed directly to this court and the Circuit Court appropriately certified the question of jurisdiction. Act. of March 3, 1891, C. 517, pp. 5, 26 Stat. 826.
>
> When two or more plaintiffs, having separate demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. Shields v. Thomas, 17 How. 3; Rodd v. Heartt, 17 Wall. 354; Davies v. Corbin, 112 U. S. 36, 40; Gibson v. Shufeldt, 122 U. S. 27; New Orleans Pacific Railway Co. v. Parker, 143 U. S. 42; Walter v. Northeastern Railroad Co., 147 U. S. 370, 373; Davis v. Schwartz, 155 U. S. 631, 647; Illinois Central Railroad Co. v. Adams, 180 U. S. 28."
>
> The present suit is of the latter class. Its controlling object—that which makes it cognizable in equity—is the enforcement of the

vendor's lien, which is a sing' hing or equity in which the plaintiffs have a common and undivided interest, and which neither can enforce in the absence of the other. Thus, while their claim under the notes were separate and distinct, their claim under the vendor's lien was single and undivided, and the lien was sought to be enforced as a common security for the payment of both notes."

Berryman v. Whitman College, 222 U. S. 334, (1912), was an action to enjoin a tax from which the complainant claimed to be exempt under a contract with the territory of Washington, the amount of the tax was less than the jurisdictional amount; the court held that the tax which was described was not the matter in issue but on the contrary, that it was the contract right to tax exemption; that jurisdiction must be measured by the value of the right to be protected and sustained jurisdiction. Holt v. Ind. Mfg. Co., 176 U. S. 68 and five other cases were cited, in support of the challenge of jurisdiction. On page 348, this court said:

> "We state, in margin, the cases principally relied upon to support the contention as to the want of jurisdiction. It would suffice to say of these cases that if they supported the proposition which they are cited to maintain, they have been qualified and restricted by the cases which we have just reviewed."

In Humes v. City of Ft. Smith, 93 Fed. 857, it was held that "the amount involved in a suit for an injunction for the purpose of determining the jurisdiction of a federal court, is the value of the

right to be protected or the extent of the injury to be prevented by the injunction."

The principle which was applied in Brown v. Trousdale antedated that case by many years.

In M. & M. Ry. Co. v. Ward, 2 Black 485, 67 U. S. 485, which was an action in equity by James Ward, an owner and operator of steam boats, to enjoin, by a suit in the United States District Court, the building of a bridge across the Mississippi River on the ground that it was a nuisance, the court held that its jurisdiction was to be tested by the value of the object to be obtained, which was the removal of the nuisance and was not to be determined by the damages sustained by the complainant.

In Shields v. Thomas, 17 Howard 3; 21 U. S. 335, the court, through Chief Justice Tainey, overruled a motion to dismiss on the ground that the sum in controversy was less than $2,000. The court held that the matter in controversy was the sum due to the representatives of the deceased collectively. It was the entire sum which was in dispute.

In Market Co. v. Hoffman, 101 U. S. 112, two hundred and five occupants of market stalls were complainants asking an injunction in favor of each and a decree establishing their right to occupy their stalls. We quote from the opinion:

> "The first question to be determined is whether the amount in controversy is sufficient to give us jurisdiction of the appeal. Upon

this we have no doubt. While it may be true, that if Hoffman was the sole complainant, the amount in controversy would be insufficient to justify an appeal either by him or the company, the case is one of two hundred and six complainants suing jointly, the decree is a single one in favor of them all, and in denial of the right claimed by the company, which is of far greater value than the sum which, by the act of Congress, is the limit below which an appeal is not allowable. It is averred under oath in the pleadings that the sale which the company proposed to make, and the court below enjoined, would have realized to the company more than $60,000. Of this benefit the decree deprives them. It is very plain, therefore, that the appeal is one within our jurisdiction."

In the "Conemara" 103 U. S. 754, which was a suit to recover for a single salvage service, the amount of the recovery was $14,198, which, upon being divided among the parties entitled thereto, would give each less than $5,000, the jurisdictional amount. The court sustained jurisdiction, holding that

> "The matter in controversy was the amount due the salvors collectively and not the particular sum to which each was entitled when the amount due was distributed among them."

The same principle was applied in the "Mamie" 105, U. S. 773.

In Estes v. Gunter, 21 U. S. 183, which was an action in equity to enjoin a sale under attachment and to have an assignment declared invalid, it was held, on motion to dismiss, on the ground that the claim was not sufficient to give jurisdiction,

that the court had jurisdiction, the suit being brought not simply to defeat the attachment, but to establish the assignment and make it available.

Colvin v. Jacksonville, 185, U. S. 456 belongs to a different class of cases. It belongs to the class in which the main purpose of the plaintiff's suit is to protect his individual interest and prevent damage to himself. This was a suit to enjoin the issuance of a million dollars worth of bonds by the City of Jacksonville. The opinion is by Chief Justice Fuller, who also wrote the opinion in Brown v. Trousdale. In this case the plaintiff, in his bill, alleged the taxes which would be assessed upon his property, because of these bonds, would exceed $2,000. Issue was taken by answer, upon the amount of the burden which would be cast upon the plaintiff because of the bonds. The court found that it would not exceed $2,000. The plaintiff placed the amount of his liability in issue. The Supreme Court was bound by the record which was certified to it. The court held that the jurisdiction was not established, placing the case in the category of El Paso Water Co. v. El Paso, infra and concluded that it was the amount of interest of complainants which was in issue and not the entire issue of bonds. In closing its opinion, the court restated the rule which it had laid down and applied in Brown v. Trousdale evidently to make it clear that the case, then being decided, did not come under the rule in that case. This case makes clear the distinction upon which we rely. We quote at length from his opinion.

"We are confined in the disposition of the case to the certificate, from which it appears that the case was heard upon a motion for an injunction and for the appointment of a receiver, on the bill and amended bill, answer and affidavits. And that the court found as matter of fact that the entire amount of taxes which complainant would be obliged to pay as interest and sinking fund on account of the proposed issue of bonds would not exceed $2,000, and thereupon dismissed the bill for want of jurisdiction. It was contended by complainant that the amount of taxes he would have to pay was not the amount in controversy, but that the total amount of the issue of bonds was. But this contention was overruled, and if the court did not err in that particular, and assuming as we must, that complainant's liability did not exceed $2,000, the decree of the court was right, since it was its duty, when it appeared to its satisfaction that the suit did not really and substantially involve a dispute or controversy properly within its jurisdiction, to proceed no farther, and to dismiss the case. Morris v. Gilmer, 129 U. S. 315. This leaves the only question to be considered whether the amount of the interest of complainant, and not the entire issue of bonds, was the amount of controversy, and, in respect of that, we have no doubt the ruling of the Circuit Court was correct. In El Paso Water Company v. El Paso, 152 U. S. 157, 159, which was a bill filed by the water company against the City of El Paso, for an injunction, it was alleged, among other things, that if certain bonds were issued, the complainant would be compelled to pay taxes on its property for the interest on the bonds and to provide a sinking fund for the principal thereof, but the amount of the tax that would be thereby cast upon complainant's property was not disclosed, and we said upon the question whether there was a sufficient amount in

controversy to give this court jurisdiction: 'The bill is filed by the plaintiff to protect its individual interest, and to prevent damage to itself. It must, therefore, affirmatively appear that the acts charged against the city, and sought to be enjoined, would result in its damage to an amount in excess of $5,000. So far as respects the matter of taxes which, by the issue of bonds, would be cast upon the property of the plaintiff, it is enough to say that the amount thereof is not stated, nor any facts given from which it can be fairly inferred.' The case is in point and is decisive.

Brown v. Trousdale, 138 U. S. 389, 394, is not to the contrary. There several hundred taxpayers of a county in Kentucky for themselves and others, associated with them, numbering about twelve hundred, and for and on behalf of all other taxpayers in the county, 'and for the benefit likewise of said county,' filed their bill of complaint against the county authorities and certain funding officers, and all the holders of the bonds, seeking a decree adjudging the invalidity of two series of bonds aggregating many hundred thousand dollars, and perpetually enjoining their collection; and an injunction was also asked incidental to the principal relief against the collection of a particular tax levied to meet the interest on the bonds. The leading question here was whether the case had been properly removed from the state court, and no consideration was given to the case upon the merits. As to the jurisdiction of this court, we said: 'The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon, and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county, as such, and the in-

terest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs, each claiming under a separate and distinct right, in respect to a separate and distinct liability and that contested by the adverse party, is not applicable here. For although as to the tax for the particular year, the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appelles in in that regard.' "

All of the cases cited by the trial Judge in support of his views in this case are of the class of Colvin v. Jacksonville.

In Green v. L. & I. Ry. Co., 244 U. S., 499-508 the plaintiffs sought relief from certain assessments.

In Orleans Kenner Electric Ry. Co. v. Dunbar, 218 Fed. 344-346, the sole purpose of that suit was to protect the original plaintiff's individual interests and to prevent damage to him * * *."

In Cowell v. City Water Supply Co., 121 Fed. 53, the purpose of the suit was to protect the plaintiff's interest in specific property and the value of his interest was less than the jurisdictional amount.

In Risley v. Utica, 168 Fed. 737, the object of the suit was to restrain and cancel a tax which had been levied against the plaintiff.

In Wheless v. City of St. Louis, 96 Fed. 865, affirmed, 180 U. S. 379, a number of lot owners joined as complainants to restrain assessments against their lots. The assessment against no one of the complainants equalled the jurisdictional amount. The court held that the amounts could not be aggregated, and that that case came under the principle which governs cases where complainants sue to protect their individual interests, and did not come under the rule of Brown v. Trousdale and similar cases. The Court of Appeals, speaking through Judge Adams, and referring to these cases, page 869, said:

> "Counsel for complainants rely specially upon the cases of Davies v. Corbin, 112 U. S. 36, 5 Supt. Ct. 4, and Brown v. Trousdale, 138 U. S. 389, 11 Sup. Ct. 308. Concerning the first of these cases, it appears that the chief justice, who wrote the opinion, in reaching a conclusion found and held that all the relators claim under one and the same title, namely, the levy of taxes already made expressly for their benefit, and therefore that they, and each and all of the relators, have a common interest in the tax; and, inasmuch as it was immaterial to the collector whether he paid it to one or another of the complainants, the chief justice properly classifies this case with those of Shields v. Thomas, supra, and other cases in which aggregation of claims may be made for jurisdictional purposes. In the other of the cases so relied upon the chief justice, in delivering the opinion of the court, *properly stated* that the main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay the interest thereon, and finally the principal thereof, and not the mere restraining of

> a tax for a single year, and for this reason held that the rule applicable to complainants each claiming under a separate and distinct right in respect to a separate and distinct liability contested by the adverse party was not applicable to that case."

In Rogers v. Hennepin County, 239 U. S. 621, the complaints' suit was for an injunction to prevent the collection of an assessment of $40 imposed against each complainant. The matters in controversy being severable, could not be aggregated to create jurisdiction.

There is no conflict between Brown v. Trousdale and the cases which are in harmony therewith, and the case of Colvin v. Jacksonville, and the cases which belong to that class; and neither case, so far as we are able to learn, has been criticised, or overruled.

In the case at bar, plaintiffs represent all of the taxpayers of the State. They have a common and joint interest in the funds in the Treasury, and in preventing their diversion to unlawful purposes, and in preventing the issuance of the bonds in question which will create a burden which will be a common one to all the taxpayers. The trial Judge erred in concluding, (Tr. Pg. 73) "that plaintiffs in this suit represent only themselves." We have shown, and it will probably be conceded, that they represent all of the taxpayers of the state. His statement, (Tr. Pg. 74, Fol. 101), that the present suit is "in all its aspects" a suit "to enjoin a threatened tax levy" is also erroneous. The

court apparently failed to distinguish the two classes of cases which are represented by Brown v. Trousdale and Colvin v. Jacksonville, and because of this, concluded that Brown v. Trousdale had been overruled and contained an erroneous statement of the law, and that Colvin v. Jacksonville represented the correct and only method of determining the amount in controversy for jurisdictional purposes.

The matters in controversy in this action, are the two constitutional amendments and the seven legislative acts. The sum or value thereof which will be directly affected by the decree is the amount of the appropriations and bonds.

THE COURT HAS JURISDICTION OF THE SUBJECT MATTER OF THIS ACTION.

The second ground of the Motion to Dismiss, by special counsel, (Tr. pgs. 53, 68), is as follows:

> "Because it appears in the complaint filed in this cause that this Honorable Court has no jurisdiction of the subject matter of the pretended cause of action set forth in said complaint."

This ground was not urged in the lower court, and is not referred to by the trial judge, in his opinion.

In Cooper v. Reynolds, 10 Wallace, 308, 316, this Court said: "By jurisdiction over the subject matter is meant, the nature of the cause of action and of the relief sought." It is sufficient to say that

this is an action in equity, and the trial court has jurisdiction in actions in equity by Section 24 of the Judicial Code; further that the relief sought is such as is commonly granted by courts of equity.

THE BILL OF COMPLAINT STATES A MERITORIOUS CAUSE OF ACTION WHICH UNDER THE VIEW MOST FAVORABLE TO APPELLEES REQUIRES AN ANSWER AND A TRIAL UPON THE MERITS.

The trial judge, in the opinion filed in the Court below, speaks of the merits of the case under the designation "the other jurisdictional element" (Tr. 76); however, in the order allowing appeal it is stated that

> "For the purpose of removing any doubt as to the scope of the decree, the court adds that in passing upon the question whether the bill presents a case arising under the Federal Constitution, the court passed and intended to pass on the merits." (Tr. 84).

In presenting that question and before entering upon an analysis of the Legislation involved, we deem it proper to first consider some of the general rules of law applicable to the facts and conditions as presented to the court. In discussing the questions involved it is to be expected that we may deal with some questions that seem elementary or have been already settled, but we desire to approach the analysis of the Legislation under con-

sideration along an avenue set with sign posts leading to a definition in general terms of "public use" as contemplated when speaking of the purpose for which taxes may be raised, that will have the sanction and approval of this court, and if we can demonstrate, as be believe we can, that taxes raised for the purposes involved in the so-called economic program of the North Dakota Legislature, do not come within the definition so approved, then we ask for the judgment of this court sustaining our Bill.

It will be urged on behalf of the appellees that the state is supreme, that the rule suggested by the trial judge in the quotation from the opinion in McCulloch v. Maryland, 4 Wheaton 316, is the rule that should govern here, viz: that in the matter of taxation the only security against the abuse of the power of taxation on the part of the state is found in the structure of a government itself. (Tr. 77).

We fail to see where the rule carries any comfort to the appellees when they attempt to justify the appropriation of private property through the form of taxation for the purpose of entering upon private business, for if we are correct in our judgment, the structure of the government itself prevents such appropriation.

Section 14 of the Constitution of North Dakota provides:—

> "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner, etc."

Similar statutory provisions have been construed, and, it has always been held that the Constitutional provision that private property shall not be taken, destroyed or damaged for public use without just compensation therefor, carries with it the inevitable inference that private property shall not, under any circumstances, be taken for private use without the consent of the owner, and that even the sovereign power of the state cannot take private property for public use without first making full and adequate compensation therefor.

Minnesota Canal & Power Co. v. Koochiching County, 97 Minn. 429; 107 N. W. 405.

Brown v. Gerald, 100 Me. 351; 61 Atl. 785.

It is so well recognized that for the state to take the property of one man for the benefit of another, which is the result of taking private property for any but public use, is not a constitutional exercise of the power of the government, that citation of authority seems quite unnecessary.

As Chief Justice Waite expressed it in Munn v. Illinois, 94 U. S. 113, the 14th Amendment was adopted as a guarantee against any encroachment upon an acknowledged right of citizenship by the Legislature of the state. In other words, the rule has been always, as expressed by this court time and again, and by the state courts time without number, that

"The use for which private property is to be taken must be a public one, whether the taking

be by the exercise of the right of eminent domain or by that of taxation."

Cole v. La Grange, 113 U. S. 1.

Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112; (161) 41 L. Ed. 369 (389).

In fact it has been by this court

"Established beyond cavil, that there can be no lawful tax which is not laid for a public purpose."

Loan Assn. v. Topeka, 20 Wall. 655 (659), 22 L. Ed. 455.

Jones v. Portland, 245 U. S. 217.

In Fanning v. D. M. Osborne & Co., 102 N. Y. 441; 7 N. E. 307, (309) the court of appeals in speaking of a franchise that had been granted to a street railway company and the use thereof contracted to Osborne & Co., said:—

"The right to construct and operate a street railway is a franchise which must have its source in the sovereign power. The legislative power over the subject is also subject to the limitation that the franchise must be granted for public, and not for private purposes, etc. * * * It is plainly contrary to public policy that a franchise granted for public purposes should be used as a mere cover for a private enterprise."

We submit that the same rule must apply in the matter of the appropriation of property by taxation, that accepting the rule as established that private property cannot be taken for a private enterprise without the consent of the owner, then we have the corollary that property cannot be appro-

priated even in the name of the state as a mere cover for a private enterprise.

In the court below it was argued that the adoption of the constitutional amendments and the passage of the acts involved amounted to a declaration on the part of the state and the legislature that the purposes for which the money was to be raised were public, particularly was this urged with respect to the legislative enactments.

While the trial judge did not express his views in as broad terms as the argument of the counsel for appellees, yet in his opinion it is suggested that the legislative enactment should be a controlling factor of great power in determining the question. (Tr. 78, folio 107).

In this connection we desire to call attention to Amended § 185 of the State Constitution, (Tr. 6) from which it will be seen that the constitution, or rather the amendment to the constitution, does not in any way refer to the industries, enterprises, or businesses there permitted, as being public or of a public nature. Let us quote:—

> "The state, any county or city may make internal improvements and may engage in any industry, enterprise or business not prohibited, etc."

It was the apparent purpose of the framers of the amendment, as submitted and adopted, to frame a constitutional provision broad enough in its terms to permit the state, or county, or city, to engage in private business enterprises.

Without quoting from the legislataive acts in-

volved, we would simply call the attention of the court to the fact that the Industrial Commission Act, (Tr. 21) contains, nowhere, a provision in any manner designating any of the business enterprises over which it is placed, as public in character, while the powers given to the commission are even greater than those generally accorded the Board of Directors of a private corporation.

Neither do any of the other acts involved contain any provision or declaration of public use or purpose. (See Bank of North Dakota Act, Tr. 24) (Bank of North Dakota Bond Act, Tr. 31) (North Dakota Real Estate Bond Act, Tr. 35) (Mill & Elevator Association Act, Tr. 40). In connection with this particular act we would call the attention of the court to a provision of § 2 (Tr. 40) wherein it is said:—

> "The business of the Association, in addition to other matters herein specified, may include anything that any private individual or corporation may lawfully do in conducting a similar business, etc."
>
> Mill & Elevator Association Bond Act, (Tr. 43) and Home Building Act (Tr. 48).

The question as to whether a given object is public or private is a judicial one. A Legislature cannot make a private purpose a public one by its mere fiat.

> Dodge v. Mission Township, 107 Fed. 827 (829).
>
> Brown v. Gerald, 100 Me. 351; 61 Atl. 785.

A declaration by the legislature might be urged as indicative of the sentiment of the members of the law-making body of the state, but in the instant case there is no such declaration. There evidently was no intention on the part of the managers and framers of the program, to claim a public purpose or a public use. The constitutional amendments as well as the legislative enactments, passed thereunder, each and all were framed with the idea that the state might enter upon private business enterprises, and establish and maintain the same by taxation.

Public Ownership Does not Change the Character of a Business.

It may be urged in this court that the mere fact that the state enters into a business makes of it a public business and a public use. Such suggestion was made in the court below but we did not understand at the time that it was urged with any confidence.

We do not understand how a business can be specially affected in its character by the agency through which it is conducted. A grocery business is a grocery business even though carried on by a practicing physician. A meat market is a meat market and has all of the incidents of a meat market even though it may be owned and carried on by a tailor. Any kind of mercantile or trading business retains its individual characteristics and

remains the same character of business whether carried on by a private individual, by a city, or by a state. There are certain rights of the individual to be protected, among which is the right to secure, control, possess and use property without interference, except where the same must be taken for a public use and then it cannot be taken until full compensation is paid.

It is not the policy of the law to permit the rights of the individual to be infringed upon through subterfuge. His personal rights are to be protected whether the attempt at invasion is by an individual, a private or a public corporation, by the state, or even by the national government. We are unable to point out any court decision having this particular point directly involved, but we believe the rule as laid down by Mr. Justice Marshall in United States v. Planters Bank of Georgia, 9 Wheaton, 904 (907), 6 L. Ed. 244, and which has been from time to time, referred to, not in its entirety, but in different phases, to be the rule today. We quote:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs * * * to the business which is to be transacted."

It can make no difference whether the government is a partner or is carrying on the business individually. The same rule, it would seem, must apply.

THE POSITION OF PLAINTIFFS BEFORE THIS COURT.

While it is true that there exists a presumption in favor of laws imposing taxes, and also true that the courts will assume the constitutionality of legislative acts until the contrary is shown, yet when the question is raised the courts cannot, in the proper discharge of the duties imposed upon them, shirk or evade the responsibility of passing squarely upon the question.

To say that the mere enactment of a statute by the legislature can make the subject public is to say that the legislature can validate its own act. Such argument would leave the courts without power to pass upon the constitutionality of any act of the legislature.

To say that the finding of the state court upon a question of public use is binding upon this court is to deprive the citizen of an opportunity to have the question of the invasion of the rights, guaranteed to him by the Federal Constitution, passed upon by the courts that are organized for the purpose of protecting such rights and upholding the provisions of the Federal Constitution.

Reference has already been made to the language of Chief Justice Marshall in McCulloch v. Maryland, and much stress will, of course, be placed

upon the opinion filed by the trial judge as well as the recent decision of the Supreme Court of North Dakota of which we speak elsewhere.

We submit, however, that while the utterances of these courts are entitled to, and will, receive proper consideration at the hands of this court, yet the question of public use is one that is squarely before this court and must be passed upon according to the facts presented and not according to the views expressed by either the trial judge or the judges of the State Supreme Court which may have been colored by the particular brand of political economy upon which these acts are grounded.

The purpose of the 14th Amendment was to limit the power of the states. Previous to its adoption there was a limitation upon the power of the general government by the 5th Amendment, but with no corresponding limitation upon the state. If we look into the history of constitution making in this country we discover that from the beginning there has been an increasing tendency to limit the power of the different state governments in the matter of taxation. During the period from 1776 to 1796 in some 22 constitutions adopted less than half of them contained any statement of importance relating to taxation. However, Massachusetts, new Hampshire and Vermont safe-guarded their people with somewhat similar provisions to those contained in the Pennsylvania constitution which provided:—

> "No public tax, custom or contribution, shall be imposed upon, or paid by the people

of his state, except by a law for that purpose: And before any law be made for raising it, the purpose for which any tax is to be raised ought to appear clearly to the legislature to be of more service to the community than the money would be, if not collected; which being well observed, taxes can never be burdens."

From 1796 to 1834 in the neighborhood of 15 constitutions were adopted by the people of the different states, and while the limiting clauses were not contained in the very great majority of them, yet the idea was evidently more in favor than during the previous periods.

During the period, however, from 1834 to 1860 we find that more than three fourths of the constitutions adopted contained provisions generally fixing the kind of property that was taxable and a statement of principles and rules governing assessments and taxation, and from 1860 to 1890 there seemed to be a more decided advance upon the subject of limitations of taxing power. In 1868 the 14th amendment was adopted by which a limit was put upon the power of the state.

The rule, however, requiring that taxes should be levied for a public purpose did not come into being with the 14th Amendment. The fundamental principle that taxes can be levied only for public purposes had been declared in some of the state courts long before the adoption of the 14th amendment, and irrespective of any express constitutional declaration. That amendment simply protected the citizen by a federal constitutional enactment against enthusiastic legislation on the part of the

state and enabled the citizen to invoke the Federal Constittuion for protection when private rights were invaded or threatened by legislation, the result of the vagaries of sociological dreamers.

If, in determining the right of the citizen, the act of the state legislature, or the decision of the state supreme court is to govern, then the 14th amendment becomes innocuous, and is but a "scrap of paper."

In McCoy v. Union Elevated Railway Company, 247 U. S. 354 (363); 62 L. Ed. 1156 (1165), in a case dealing with the question of the appropriation of private property through eminent domain this court said that it could examine proceedings in state courts for appropriation of private property to public purposes so far as to inquire whether a rule of law was adopted in absolute disregard of the owner's right to just compensation, and if the necessary result was to deprive him of property without such compensation then due process of law was denied him and this, contrary to the 14th amendment, with the result, of course, that this court would take cognizance and pass upon the rights.

In Chicago, Burlington & Quincy Railroad Co. v. City of Chicago, 166 U. S. 226, (237), 41 L. Ed. 979 (985) this court having before it the question of appropriation of private property for a public purpose without compensation, which is on principle on a parity with the taking of private prop-

erty for private purpose, and one in the same manner as the other, a violation of the provisions of the 14th amendment, held the right of the court to examine into the proceedings, not alone of the legislature, but of the court of the state, and among other things announced the same rule contended for above, that if a state could make anything due process of law simply by its own legislation, simply by declaring it such, that the prohibition to the state was of no avail, or had no application where the invasion of private right was affected under the forms of state legislation. The court further announced the rule that the prohibitions of the 14th amendment extended to all acts of the state, whether through its legislative, its executive or its judicial authority, and quoting with approval from Loan Association v. Topeka, 20 Wall. 655, supra, said:—

> "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Again this court in C., B. & Q. R. Co. v. Chicago, supra, said:

> "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or un-

der its direction for public use, without compensation made or secured to the owner, is, upon principle and authorirty, wanting in the due process of law required by the 14th amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

This court, in the last case cited, quotes from Scott v. Toledo, 36 Fed, 385:—

> "In Scott v. Toledo, 36 Fed. Rep. 385; 395-396, the late Mr. Justice Jackson, while circuit judge, had occasion to consider this question. After full consideration that able judge said: 'Whatever may have been the power of the states on this subject prior to the adoption of the 14th amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner; and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the state, and whether done directly, by taking the property of one person and vesting it in another or the public, or indirectly through the forms of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that 'due process of law' required by said amendment."

The question to be determined is whether the rights of the citizens complaining and of those for

whom they stand in representative capacity are being or are about to be invaded by the legislative enactments complained of. In this case the plaintiffs and appellants complain, not only of the result that is to follow the putting into effect of the acts, but complain of the acts themselves; and complain that their rights under the Federal Constitution are being invaded. We say in the language of this court in McCulloch v. Maryland, 4 Wheaton, 316, (426) that

> "The great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them."

Hence it is immaterial what the Legislature of North Dakota may have done, or what the Supreme Court of North Dakota may have said. The question now is, what are the facts as presented by this record, and what are the rights of these plaintiffs and those whom they represent? To paraphrase the language of the late Justice Brewer when, as a circuit judge, he wrote the opinion in McElroy v. Kansas City, 21 Federal 257 (260) we say that today in these days when the power of the state is pressed to such an extent and when the urgency of so-called public purposes rest as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of these constitutional provisions intended to protect every man in the possession of his own.

Political disturbances and emotional action o the part of the people is very apt to bring abou radical legislation accompanied by lax construc tion of what is a public purpose. Therefore, th question is one that should be determined by thi court upon its own investigation and according t its own judgment upon the record as presented.

What Is a Public Purpose?

Before taking up a discussion of the particula legislation involved in this action it is important that we should, if possible, settle upon some rul by which to determine what is a public purpose establish some line on one side of which will fal those activities which are public, and on the other those which are private. In determining that question, and in establishing such a line, we must give consideration to the opinions of states as well as Federal Courts, and we desire at this time to refer briefly to the expression of some of the courts before whom this question has been discussed.

(1850) In Northern Liberties v. St. John's Church, 13 Penn. St. 104, the Court said:—

> "We think the common mind has everywhere taken in the understanding that taxes are public impositions levied by authority of the government for the purpose of carrying on the government in all its machinery and operation, that they are imposed for a public purpose."

(1870) In People v. Salem, 20 Mich. 452, (474-475, 483-484, 488), the Supreme Court of that state speaking through Judge Cooley, among other things said:—

"Taxation is a mode of raising revenue for public purposes only, and, as is said in some of the cases, when it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation and becomes plunder. * * * I do not understand that the word 'public,' when employed in reference to this power, is to be construed or applied in any narrow or illiberal sense, or in any sense which would preclude the legislature from taking broad views of state interest, necessity or policy, or from giving those views effect by means of the public revenues. * * * When we examine the power of taxation with a view to ascertain the purposes for which burdens may be imposed upon the public, we perceive at once that necessity is not the governing consideration, and that in many cases it has little or nothing to do with the question presented. Certain objects must of necessity be provided for under this power, but in regard to innumerable other objects for which the state imposes, taxes upon its citizens, the question is always one of mere policy, and if the taxes are imposed, it is not because it is absolutely necessary that those objects should be accomplished, but because on the whole it is deemed best for the public authorities that they should be. On the other hand certain things of absolute necessity to civilized society the state is precluded, either by express constitutional provisions, or by necessary implication, from providing for at all; and they are left wholly to the fostering care of private enterprise and private liberality. * * * By common consent also a large portion of the most urgent needs of society are relegated exclusively to the law of demand and supply. It

> is this in its natural operation, and without the interference of the government, that gives us the proper proportion of tillers of the soil, artisans, manufacturers, merchants and professional men, and that determines when and where they shall give to society the benefit of their particular services. However great the need in the direction of any particular calling, the interference of the government is not tolerated, because, though it might be supplying a public want, it is considered as invading the domain that belongs exclusively to private inclination and enterprise. We perceive, therefore, that the term 'public purpose,' as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish the objects for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality. * * * The incidental benefit which any enterprise may bring to the public, has never been recognized as sufficient of itself to bring the object within the sphere of taxation."

(1874) In Citizens Savings & Loan Assn. v. Topeka, 20 Wall. 655 (668, 667), 22 L. Ed. 455 (462, 461) this Court in an opinion written by Mr. Justice Miller, laid down certain rules and principles with respect to taxation for public purposes that established the law and has been cited and quoted from, more than any other case upon the subject.

There was no attempt to expressly designate and itemize such businesses as might become public, but the general principles were enunciated and are as controlling today as then.

In expressing the rule to govern the courts in determining whether a given use was a public use or not, it is said that they must be:

> "Governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of lawful taxation."

The provision in the rule that whatever is considered necessary to the maintenance of good government is a principle broad enough to cover every use that has been sanctioned by this court.

In speaking further, however, of particular matters, the court in the Topeka case said:—

> "If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions."

In this same case, in speaking of the limitation upon the power of the State Legislature, to tax the people for a private purpose, the Court said:—

> "It must be conceded that there are such rights in every free government beyond the

> control of the state. A government which recognizes no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. * * * The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere."

(1892) In re House Bill # 519, Opinion of the Justices of the Supreme Judicial Court of Massachusetts, 155 Mass. 598; 30 N. E. 1142, (1146) opinion given May 7th, 1892, Mr. Justice Barker said:—

> "It is not within the constitutional power of the state to engage in trade or manufacture merely for the purpose of having any branch of business conducted upon a convenient or economical plan. * * * The legislature has no constitutional right to create agencies for the (private business) purpose. It has no right to authorize towns and cities to engage in trade merely to try an experiment in practical economics or to put in practice a theory."

(1901) In Dodge v. Mission Township, 107 Fed. 827, (828, 830) in a decision handed down by the Circuit Court of Appeals for the 8th Circuit, Judge Sanborn in writing the opinion said:—

> "It is a fundamental principle of a republican form of government that no man shall be involuntarily deprived of his life, liberty, or property without due process of law. The prohibition of such a deprivation by the states is found in the fourteenth amendment to the Con-

stitution of the United States. But it lies deeper, and limits and conditions every grant of legislative, executive, or judicial authority. The proposition was announced in the early history of the republic and it has been constantly affirmed. The Supreme Court said in Calder v. Bull, 3 Dall. 386 (388) 1 L. Ed. 648, (649) 'A law that punishes a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B,—it is against all reason and justice for a people to intrust a legislature with such powers, and therefore it cannot be presumed that they have done it.' A legislative act which takes, or undertakes to authorize the taking, of private property for a private object, either by taxation, or by the exercise of the power of eminent domain, or by any other means, is not a law but an arbitrary decree, whereby the property of one citizen may be transferred to another. * * * Speaking generally, a public purpose is a governmental purpose, one of the purposes for which governments are instituted and maintained among men, such as the maintenance of order, the prevention and punishment of crime, the care of highways, the relief of the destitute, the education of the youth, the erection of buildings for the use of schools and of the officers of the government; while a private object is one which is ordinarily sought and attained by individuals or private associations of individuals, such as the cultivation of the soil, the manufacture of useful and attractive articles, the purchase and sale of merchandise, and the thousand and one purposes which enlist individual enterprise and energy in a complex and advancing civilization."

(1905) In Brown v. Gerald, 100 Me. 351; 6
Atl. 793, (794) the Court said:—

> "That only can be considered a public us
> where the government is supplying its ow
> needs, or is furnishing facilities for its cit
> zens in regard to those matters of public ne
> cessity, convenience, or welfare, which, on ac
> count of their peculiar character, and the diff
> culty, perhaps impossibility, of making pro
> visions for them otherwise, is alike proper
> useful, and needful for the government to pro
> vide. * * * Property is devoted to a pub
> lic use when, and only when the use is one
> which the public in its organized capacity, to
> wit, the state, has a right to create and main
> tain, and therefore one which all the public
> has a right to demand and share in. * * * In
> a broad sense it is the right in the public to an
> actual use, and not to an incidental benefit."

(1905) In Clark v. Nash, 198 U. S. 361 (369);
49 L. Ed. 1085 (1088) an action involving the con
demnation of a right of way in favor of an individ
ual land owner across his neighbor's land in the
State of Utah. This court put its seal of approval
upon the rule that the number involved was not a
test as to whether a certain act was for a public
purpose or not, and while it was held a public pur
pose to obtain water for the land of one man in
this particular case, there were circumstances
and conditions surrounding the case that do not
appear in the instant case.

In the course of the opinion the Court said:—

> "But we do not desire to be understood by
> this decision as approving of the broad propo
> sition that private property may be taken in
> all cases where the taking may promote the

public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained."

(1912) In Beach v. Bradstreet, 85 Conn. 344; 82 Atl. 1030 (1032), the court said:—

"The test of the Act before us is: Will it serve a recognized object of government, and will it directly promote the welfare of the people of the state in equal measure?"

(1913) In State v. Lynch, 88 Ohio St. 31; 102 N. E. 670 (673) the court said:—

"The functions of the state are governmental only, except so far as proprietary rights may become incident to the exercise of the primary function."

(1914) In Union Ice & Coal Co. v. Town of Ruston, 135 La. 898; 66 So. 262, the court said:—

"The question is not whether the thing can be done economically or not, but whether the doing of it falls within the legitimate functions of municipal government. The fact that shoes and ready made clothing could be manufactured more cheaply by the municipality in connection with its public utilities would not justify the town in going into the shoes and clothes business. * * * By common consent a large portion of the most urgent needs of society are relegated exclusively to the law

> of demand and supplies. * * * Trade is not and cannot properly be regarded as one of the functions of government. On the contrary its function is to protect the citizens in the exercise of any lawful employment."

(1914) In Laughlin v. Portland, 111 Me. 488; 90 Atl. 318 (320-321) the court said:—

> "The exact line of cleavage between what is, and what is not, a public use, is somewhat difficult to mark. Some purposes readily align themselves on one side of the line as being clearly public in their nature, while others as readily fall on the other side as being obviously private, and there is a debatable ground between the two. * * * The courts have never attempted to lay down with minute detail an inexorable rule distinguishing public from private purposes, because it would be impossible to do so. * * * In general it may be said that matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot successfully be dealt with without the aid of powers derived from the legislature, may be subjected to municipal control when the benefits received are such that each inhabitant needs them and may participate in them, and it is for the interest of each inhabitant that others, as well as himself, should possess and enjoy them."

In that particular case the question was decided upon the principle that the difficulty in obtaining an adequate supply of a necessary commodity furnished a reason for the supplying of the commodity by the municipality and made it a public use.

(1917) In Jones v. Portland, 245 U. S. 217 (223, 224); 62 L. Ed. 252, (255, 256) this court had before it a case similar to that of Laughlin v. Port-

land, supra, and in passing upon the right of the city to establish and maintain a permanent wood, coal and fuel yard for the purpose of selling at cost, wood, coal and fuel to its inhabitants, this court quoted with approval the language of the Supreme Court of Maine in Laughlin v. Portland, wherein it was said:—

> "The vital and essential element is the character of the service rendered, and not the means by which it is rendered."

Again this Court quotes:—

> "But it is urged, why, if the city can establish a municipal fuel yard, can it not enter upon any kind of commercial business, and carry on a grocery store or a meat market or a bakery. The answer has been already indicated. Such kinds of business do not measure up to either of the accepted tests."

The tests referred to were given in Laughlin v. Portland, as follows:—

> "First, the subject matter, or commodity, must be one of public necessity, convenience, or welfare. The second test is the difficulty which individuals have in providing it for themselves."

Passing on this the court in Jones v. Portland notes further from Laughlin v. Portland as follows:—

> "The purpose of the act is neither to embark in business for the sake of direct profits nor for the sake of the indirect gains that may result to purchasers through reduction in price by government competition. It is simply to enable the citizens to be supplied with something which is necessity in its absolute sense

to the enjoyment of life and health, whic could otherwise be obtained with great dif culty and at times perhaps not at all, an whose absence would endanger the communit as a whole."

Political economists have taken their turn in a effort to formulate some definition of public u that would fit all cases, but without avail, for it of such a character that it is necessary that eac case should stand upon its own bottom. It ha been suggested by some that in determinin whether a certain use falls upon one side or th other of the line, attention must incessantly b urged that neither the state nor any of its subd visions can engage in industry without justifyin every specific enterprise by unquestioned evidenc of its public expediency, and that even then it re mains to be shown that such an enterprise ca have any claim except in temporary and provisiona manner upon taxation as a source of revenue.

It is impossible to lay down any hard and fa rule by which to gauge public use, but it seem to be clearly in the mind of all judges and law writers that to justify a public tax the use for whic the tax is raised must be

First: Governmental, and

Second: For a public purpose.

A careful review of the cases, and an earnest e fort to determine a general rule that will prote the individual rights and at the same time have su ficient flexibility to enable the state or divisi

thereof to properly discharge its duty, leads us to suggest that in determining whether the purpose for which the tax is levied is public, the courts must consider:

(a) Whether it is one of those purposes that readily fall on the public side of the line, such as support of schools, relief of paupers, maintenance of highways, and other municipal acts that have by a long course of conduct, become thoroughly recognized as public purposes, in which are included the furnishing of water, light and heat, or

(b) Whether the government is supplying its own needs or its furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare, which, on account of their peculiar character, and the difficulty, or perhaps impossibility of making provision for them otherwise, is alike proper, useful and needful for the government to provide. And in determining that question the court should be influenced by the need of the particular community for the proposed innovation; by the ability of private enterprise to supply the needs; by the availability of private capital; by the general condition of the community, and whether the service rendered is so rendered to the people as a relief measure and will protect the public welfare in equal measure, and at cost or approximatly so, but

(c) If the benefits to the public are to be incidental, if the state or division thereof is entering

into trade merely to try an experiment in practical economics, or to put into practice a theory, if the business enterprise is being entered upon simply that some commodity may be furnished to that portion of the community using that commodity at a cheaper price, or if the enterprise is being entered upon for the purpose of enhancing the value of some particular raw material, then it is merely a trade, a private business, and cannot be supported by a public tax.

Certain Private Rights Inalienable.

In Jones v. Portland, supra, this court quoted with apparent approval from Laughlin v. Portland, wherein the rule is laid down that the principle that municipalities, which necessarily includes the state, can neither invade private liberty nor encroach upon the field of private enterprise, should be strictly maintained as it is one of the main foundations of our prosperity and success.

Certain rights to which all men are inherently entitled, were, however, by the Constitution of North Dakota, especially safe-guarded. In Article 1, being the Declaration of Rights, at Section 1, it is provided:—

> "All men are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; and pursuing and obtaining safety and happiness."

In the same article at § 14 it is provided:—

> "Private property shall not be taken or damaged for public use without just compensation having been first made, etc."

Under the rule already referred to that the inclusion of the prohibition against taking private property for public use without just compensation, necessarily excludes the idea of taking private property for private use under any consideration without the consent of the owner, together with the declaration of the rights to acquire, possess and protect property, carries with it unquestionably the intent of the constitution framers of North Dakota to protect the citizen in these rights, and in order to show how thoroughly such rights were to be protected § 24 of Article 1 was enacted, as follows:—

> "To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate."

Thus it is taken out of the power of the majority of the people to interfere with the rights of the individual thus accorded by constitutional provision, and under the rule of the constitution of North Dakota, under the rule enunciated by state courts and by this court, we submit that neither the fact that a great many people benefit by an enterprise to be established, or that the enterprise is desired or voted for, or is approved by a great many people, can make the use of the money contrib-

uted to that particular enterprise by taxation, a public use, for while a social compact is a covenant by which the whole people covenant with each citizen, and each citizen with the whole people, that all should be governed by certain laws for the common good, this does not confer power upon the people to control rights which are purely and exclusively private. These are reserved rights and are inalienable.

Munn v. Illinois, 94 U. S. 113; 24 L. Ed. 77.

Legislation Involved.

We desire now to take up, for discussion, the legislation involved in this action in order that we may determine on which side of the line these particular legislative enactments fall, and as a preliminary to that discussion we desire to present the legislative enactments separately and in abstract form, but presenting in this brief and argument what we consider the controlling features.

Industrial Commission Act.

House Bill No. 17. (Tr. 21-24.)

The title to the act reads as follows:

"An Act, creating the Industrial Commission of North Dakota, authorizing it to conduct and manage on behalf of the state certain utilities, industries, enterprises, and business projects, and defining its powers and duties;

and making an appropriation therefor." (Tr. 21.)

§ 1 of the Act provides:

"A Commission is hereby created and established to conduct and manage, on behalf of the State of North Dakota, certain utilities, industries, enterprises and business projects, now or hereafter established by law. It shall be known as The Industrial Commission of North Dakota, but may be designated as The Industrial Commission." (Tr. 21.)

Subsequent provisions of the act fix the membership of the Commission, describe its general powers and duties.

Under § 5 the Commission is empowered and directed to

"Manage, operate, control and govern all utilities, enterprises and business projects, now or hereafter established, owned, undertaken, administered or operated by the State of North Dakota, except those carried on in penal, charitable or educational institutions. To that end it shall have the power, in the exercise of its sound judgment, and is hereby directed:

(a) To determine the locations of such utilities, industries, enterprises and business projects. (Tr. 22.)

(b) To acquire by purchase, lease or THE RIGHT OF EMINENT DOMAIN ALL NECESSARY PROPERTIES AND PROPERTY RIGHTS TO CONSTRUCT BUILDINGS, ETC., for any or all of the industries. (Tr. 22.)

(c) To fix the buying price of things bought, and the selling price of things sold, incidental to the said utilities, industries, enterprises and business projects, and to fix rates and charges

for any and all services rendered thereby having in mind the accumulation of a fund with which to replace in the general funds of the state the amount received by the Commission under appropriation made by this act, or as may be directed by the legislative assembly. (Tr. 23.)

(g) To procure the necessary funds for such utilities, industries, enterprises and business projects by negotiating the bonds of the State of North Dakota, in such amounts and in such manner as may be provided by law." (Tr. 23.)

$200,000.00 of the general funds of the State of North Dakota is by this Act appropriated for the purpose of carrying out the provisions of the Act, and that sum made immediately available. (Tr. 24.)

THE BANK OF NORTH DAKOTA ACT—HOUSE BILL No. 18. (Tr. 24-30.)

House Bill No. 18, being what is called "The Bank of North Dakota Act", has as its subject the creation of a bank to conduct an ordinary banking business. The title of the Act provides:

"An Act declaring the purpose of the State of North Dakota to engage in the banking business and establish a system of banking under the name of 'The Bank of North Dakota', operated by the state, and defining the scope and manner of its operation and the powers and duties of the persons charged with its management; making an appropriation therefor; and providing penalties for the violation of certain provisions thereof." (Tr. 24.)

§ 2 places the Industrial Commission in full charge of operation, management and control of the bank. (Tr. 25.)

§ 3 gives the Industrial Commission the right to acquire by purchase, lease or the exercise of the right of eminent domain, all property, requisite, etc. (Tr. 25.)

§ 7 requires all public funds to be deposited in the bank, fixing a penalty for any officer or custodian of such funds who violates that provision. (Tr. 26.)

§ 10 provides that all deposits are guaranteed by the State of North Dakota. (Tr. 27.)

§ 15 provides that the Bank of North Dakota may transfer funds to other departments, institutions, utilities, industries, enterprises or business projects of the state, and may make loans to counties, cities or political sub-divisions of the state, or to state or national banks on such terms as the commission may provide, and that it can make loans to individuals, associations, private corporations, when secured by duly recorded first mortgage on real estate in the State of North Dakota, etc. (Tr. 27 & 28.)

Civil Actions may be brought against the State of North Dakota doing business with the Bank of North Dakota for matters arising out of the bank business. (Tr. 30.)

An appropriation of $100,000.00 out of the general fund of the state is made immediately available to carry out the provisions of this Act was made. (Tr. 30.)

THE BANK OF NORTH DAKOTA BOND ACT—HOUSE BILL NO. 49. (Tr. 31-35.)

The title to House Bill No. 49 reads as follows:

> "An Act providing for the issuing of bonds of the State of North Dakota in the sum of two million dollars, to be known as 'Bonds of North Dakota, Bank Series', prescribing the terms, and stating the purposes thereof; providing a tax and making other provisions for the payment thereof; making appropriations for the payment of said bonds and to carry into effect the provisions of this act; and declaring this act to be an emergency measure." (Tr. 31.)

These are the bonds, the proceeds of which, is to constitute the capital of the Bank of North Dakota. (§ 4, Tr. 32.)

The bank is to be operated for the purpose of making earnings and out of the earnings money shall be paid to the State Treasurer on order of the Commission. (§ 5, Tr. 33.)

Tax levies shall be made sufficient in amount to pay the interest due annually on the bonds. (§ 6, Tr. 33.)

When bonds shall be maturing within a period of five years the Board of Equalization shall levy a tax in an amount equal to one-fifth of the amount of the principal of the bonds. (§ 7, Tr. 33.)

The state treasurer is to establish a bank bond payment fund into which shall be paid moneys de-

ived from taxation from appropriations and from ank earnings. (§ 8, Tr. 34.)

It is also provided that there is appropriated nt of the general funds of the state, $10,000.00 or the purpose of carrying the act into effect, hich sum is made immediately available. (Tr. 5.)

ANK OF NORTH DAKOTA REAL ESTATE BOND ACT —SENATE BILL NO. 130. (Tr. 35-40.)

Title to Senate Bill No. 130 reads as follows:

"An Act providing for the issuing of bonds of the State of North Dakota in a sum not exceeding ten million dollars, to be known as 'Bonds of North Dakota, Real Estate Series', prescribing the terms and stating the purposes thereof; providing for a tax and making other provisions for the payment thereof; making appropriations and other provisions for the payment of interest and principal on said bonds, and to carry into effect the provisions of this act; and declaring this act to be an emergency measure." (Tr. 35.)

These bonds are to be issued for the purpose of gotiation and sale to raise money to procure nds for the Bank of North Dakota to replace ch funds as may have been employed by the bank m time to time in making loans upon first mortges upon real estate.

It is provided in § 6 that the face and credit of State of North Dakota is pledged for the pay-

ment of these bonds, both principal and interest. (Tr. 37.)

It is also provided by § 6 that the moneys derived from the sale of the bonds shall be placed by the Industrial Commission in the funds of the bank, and it is further provided that nothing in this act shall be construed to prevent the purchase of any said bonds with any funds in the Bank of North Dakota. (Tr. 37.)

By § 13 it is provided that the State Board of Equalization shall, if it appears that the funds in the hands of the State Treasurer are insufficient to pay either principal or interest, accruing within a period of one year thereafter, make a necessary tax levy to meet the indicated deficiency. (Tr. 39.)

§ 15 provides that the powers granted by the Act may be repeatedly exercised and the duties falling thereupon shall be likewise repeatedly performed from time to time, thus there is no time limit or period fixed when the state may ever be relieved from the indebtedness thus created. (Tr. 39.)

§ 16 provides for an appropriation of $10,000.00, making the same immediately available. (Tr. 39.)

The Bank of North Dakota-House Bill No. 18 (Tr. 24), and Bank of North Dakota Bond Act-House Bill No. 49 (Tr. 31), and North Dakota Real Estate Bond Act-Senate Bill No. 130 (Tr. 35) are all connected with the banking business to be carried on by the state.

ILL AND ELEVATOR ASSOCIATION ACT—SENATE BILL NO. 20. (Tr. 40-42.)

The title to Senate Bill No. 20 provides:

"An Act declaring the purpose of the State of North Dakota to engage in the business of manufacturing and marketing of farm products, and for establishing a warehouse, elevator, and flour mill system under the name of 'North Dakota Mill & Elevator Association' operated by the state, and defining the scope and manner of its operation, and the powers and duties of the persons charged with its management; and making an appropriation therefor." (Tr. 40.)

§ 1 of the Act declares the purpose of the state
o engage in the BUSINESS of manufacturing of farm
roducts and for that purpose shall establish a sys-
em

"Of warehouses, elevators, flour mills, factories, plants, machinery and equipment, owned, controlled and operated by it under the name of 'North Dakota Mill & Elevator Association' hereinafter for convenience called 'the Association.'" (Tr. 40.)

By subsequent provisions the Industrial Commission is placed in control of the Association with ll power. (See § 2, Tr. 40.)

§ 3 provides that the Commission is authorized acquire by purchase, lease or right of eminent main, all necessary property or properties, buildgs, etc.; to buy, manufacture, store, mortgage, edge, sell and exchange all kinds of raw and man-

ufactured farm and food products, and buy products, and to operate exchanges, bureaus, markets and agencies within and without the state, and in foreign countries. (Tr. 40.)

§ 8 contains a provision for the bringing of civil actions against the state of North Dakota on account of causes of actions, arising out of the business. (Tr. 42.)

§ 9 provides for an appropriation of certain money in the treasury that had been theretofore raised by taxation, (Tr. 42) which amounted to over $100,000.00, and provided that that fund, together with the funds procured through the sale of state bonds, should be designated as the capital of the Association. (Tr. 42.)

NORTH DAKOTA MILL & ELEVATOR ASSOCIATION BOND ACT—SENATE BILL 75. (Tr. 43-48.)

The title to Senate Bill No. 75 provides:

> "An act providing for the issuing of bonds of the State of North Dakota in a sum not exceeding five million dollars, to be known as 'Bonds of North Dakota Mill & Elevator Series'; prescribing the terms and stating the purposes thereof; providing for a tax and making other provisions for the payment thereof; making appropriations and other provisions for the payment of interest and principal of said bonds and to carry into effect the provisions of this act; and declaring this act to be an emergency measure." (Tr. 43.)

These are the bonds that are to be issued and sold for the purpose of carrying on the business of the Mill & Elevator Association.

§ 1 authorizes the issuance of State Bonds to be described as set forth in the title. (Tr. 43.)

§ 2 authorizes the Industrial Commission in its discretion to have mortgages executed upon property acquired, etc. (Tr. 43.)

§ 7 provides that the face and credit of the State of North Dakota is pledged for the payment of the bonds, both principal and interest. (Tr. 45.)

§ 7 also provides that these bonds may be purchased with any funds in the Bank of North Dakota. (Tr. 45.)

§ 10 provides for the levy of taxes, sufficient to pay the bonds, principal and interest, taking into account the earnings of the Association. (Tr. 46.)

§ 15 provides for the repetition of the powers therein granted. (Tr. 48.)

§ 17 provides for the appropriation of $10,000.00, out of the general funds of the state, to carry the provisions of the Act into effect and makes the same immediately available. (Tr. 48.)

Home Building Act—Senate Bill No. 19.
(Tr. 48-52.)

The title to Senate Bill No. 19 provides as follows:

> "An Act declaring the purpose of the State of North Dakota to engage in the enterprise of providing homes for residents of this state and to that end to establish a business system operated by the state under the name of 'The Home Building Association of North Dakota; and defining the scope and manner of its operation and the powers and duties of the persons charged with its management; and making an appropriation therefor."

§ 2 puts the Industrial Commission in full control of the Home Builders' Association. (Tr. 48.)

§ 3 provides that the Industrial Commission may acquire by purchase, lease or exercise of eminent domain, all requisite property and property rights necesary, etc. (Tr. 49.)

§ 6 provides for the formation of home-builders' liens and fixes the price of town homes at $5,000.00 and farm homes at $10,000.00. (Tr. 50.)

§ 7 permits the Industrial Commission to acquire tracts of land by purchase or by exercise of the right of eminent domain, for the purpose of carrying on the business of the Home Builders' Association. (Tr. 50.)

§ 18 provides an appropriation of $100,000.00 and makes the same immediately available. (Tr. 52.)

(Note): House Bill No. 19 did not carry a provision for a bond issue, but under its Chapter 24, Senate Bill No. 44 of the 1919 Special Session, a bond issue of two million dollars, known as "Bonds of North Dakota Home Building Series", was provided for.

In connection with the Acts just referred to we would call attention to the fact that in no one of the business enterprises provided for is there any intimation that the service is provided for the purpose of furnishing to the people of the state any article or service which concerns the welfare and convenience of all the inhabitants of the state, or is a business or service that cannot be successfully dealt with without the aid of power derived from the legislature.

There is nothing in any of the Acts to show that there is any need or necessity for the state entering upon any of the business enterprises mentioned, and there is nothing from which it can be said that the entering upon these enterprises will benefit the whole people in equal measure.

On the contrary in each of the Acts the language conveys the idea that the state is about to enter upon some business venture. There was apparently no purpose on the part of those who framed the laws to do aught than to enter upon the conduct of private business in the name of the state.

No legitimate argument can be made that any-

one of the business activities provided by the legislation under consideration is for the purpose of relieving any presently existing condition. The laws complained of provide for the carrying out of some plan of social economics, or of economics socialized.

As was said by the Supreme Court of Wisconsin in State v. Donald, 160 Wis. 21, 151 N. W. 331, (365, 369):

> "A state wide tax * * * would need to be for a public purpose in the sense of a matter of common or general interest to those upon whom the burden is laid. There must be some present benefit. * * * 'The actual and supposed beneficial influence' upon individual and community life which might be derived from vitilizing the conceptions of sociological thinkers and would-be experimentalists is no excuse for an assault upon, or overturning at any point the fundamental law."

Again in the above case the court laid down the rule that even though done in the form of due process of law, yet an appropriation of private property for a non-public use, even though in the particular case the public might be interested in the enterprise promoted, and be largely, incidently, benefited, yet the act would be confiscation.

Accepting the rule that the power to tax carries with it the power to destroy, yet it must be conceded that that power to destroy is for governmental purposes only. That rule does not go to the extent that the government, by its power of taxation may ruthlessly and without some public or governmental purpose, destroy the property of the

people, even by taxation. It does not go to the extent that it permits a government with power to destroy by taxation, to confiscate by the same power. There is nowhere lodged the power of confiscation except under certain extreme conditions where the property is required by the government for the purpose of defense.

Decision of Trial Court and of the State Court

At this point there are two pertinent inquiries, that might well be propounded, and which call for our attention.

First. Why did the trial court sustain the motion to dismiss the bill of complaint?

In answering the first inquiry, we unhesitatingly announce that the trial judge misconceived the theory of the case, and wholly disregarded the settled rules of practice in matters brought on by demurrer or motion to dismiss.

In the bill of complaint (par. 8, Tr. 4) it is alleged:

> "That the plaintiffs bring this action as tax payers on behalf of themselves and on behalf of the other taxpayers of the state who are many thousand in number, etc."

Notwithstanding this, the trial judge, in the opinion handed down (Tr. 73) says:

> "They (the plaintiffs) assert that the suit is brought on behalf of the state to protect it against the unconstitutional use of its funds and an unconstitutional issue of bonds, etc."

This particular matter is dealt with elsewher in this brief, but we simply mention it here a showing how the trial judge misconceived the cas from the beginning.

Three fundamental errors lie at the basis of th Court's decision in sustaining the motion to dis miss upon the merits.

First: The Court ignored the rule which pre vails in courts of equity, in disposing of motion to dismiss because the bill does not set up facts to constitute a cause of action, which is to overrul the motion, and let the case go to hearing unless it is founded upon an absolutely clear proposition, that, taking the allegations to be true, the bill must be dismissed at the hearing.

Barry v. Edmunds, 116 U. S. 550; 29 L. Ed. 729.

Wetmore v. Rymer, 169 U. S. 115 (128).

Krouse v. Brevard Tannin Co., 249 Fed. 538 (548).

Second. The court ignored the allegations o the bill of complaint against which the motions o the attorney general and of special counsel were directed, which under settled rules of practice were admitted as upon demurrer.

Third. The court based its conclusion upon mat ters outside the record.

Plaintiffs in their bill allege (Tr. p. 12): "tha no condition exists in the State of North Dakot

which will authorize or justify the state in the exercise of its legitimate functions of government in engaging in the various lines of private "business" in question, and allege that "the facilities now provided for supplying the people of the State of North Dakota with the necessities and luxuries of life and conveniences and requirements for their comfort, welfare and health are adequate"; and they allege in issuable form, what the conditions in North Dakota are.

The facts thus alleged stand admitted by the two original motions, and they are expressly admitted by the answer filed by the Attorney General. (Tr. page 65, par. 26.)

No reference whatever is made by the court to these allegations of the bill or the conditions which exist in North Dakota as they are thus alleged. On the contrary, the Court based its decision wholly on matters outside of the record extrinsic to the bill and contradictory to its allegations. The amended motion (Tr. page 69) states that

> "The said motion is made upon the bill of complaint and all the files and proceedings herein, and upon all matters of which said court will take notice, including, among others, certain matters of fact, to-wit".

Attention is then called to various constitutional amendments, concurrent resolutions and political platforms and issues. No pleading or allegations on behalf of the defendants were before the court to which these requests to take judicial notice could apply. The only purpose of the "Amended

Motion" was to present a defense in this action through matters outside of the record which contradict the allegations of the bill and thus furnish a basis for a decision upon the merits. This was the effect given the amended motion by the trial court, and upon which he based his decision. After referring to the scope of the police power as defined by this court, the trial judge said (Tr. page 80, folio 111):

> "In the light of these established doctrines let us look at some of the general facts that condition this case."

He then states with some detail, hypothetical conditions which are claimed to exist in North Dakota (Tr. pages 80, 81 and 82), after which he states (Tr. page 82):

> "The foregoing is what a majority of the people of the state have been persuaded to believe by those whose leadership they trust. Whether their grievances are real or fancied, whether their remedies are wise or foolish, are subjects about which the court is not concerned. The only object in trying to set them forth has been to place the constitutional amendments and laws here assailed in their true relationship to the life and thought of the people by whom they were adopted.
>
> The sole question then for the court is: Do these acts of the state constitute a violation of the Fourteenth Amendment of the Federal Constitution as that amendment has been construed by the Supreme Court? I think it is clear that they do not. Even if I were in doubt, it would be my duty to sustain the action of the state, for it is only when legislation is plainly and palpably unconstitutional that a court is justified in nullifying it.

> The motion of the defendants will, therefore, be granted and a decree entered dismissing the bill with costs."

It thus clearly appears that the trial judge based his decision in this case upon his belief that a majority of the people of North Dakota believed that the grievances which he had recited at length in his opinion were real grievances, and that they also believed in the remedies proposed in the legislative acts in question. He did not, however, decide whether the alleged grievances were in fact real, for on this point he said:

> "Whether their grievances are real or fancied, whether their remedies are wise or foolish, are subjects about which the court is not concerned."

From the standpoint of settled practice, it is not material whether he based his decision upon what a majority of the people believed as to their alleged grievances, or upon what he himself believed as to their actual existence, for in either case his decision was based upon facts extrinsic to the bill of complaint.

A general demurrer to a bill of complaint is a denial in form and substance, of the right of complainant to have his case considered in a court of equity. It is also an admission that all of the allegations of the bill which are properly pleaded are true; and in ruling upon the demurrer, the court cannot go outside of the allegations of the bill and by resorting to judicial notice, find grounds upon which to sustain the demurrer as against the

positive averments of the bill. See Griffing v. Gibb, 2 Black, 519; Pac. R. R. Co. v. Missouri Pac. Ry. Co., 111 U. S. 505, 518; also Stewart v. Masterson, 131 U. S., 151, in which the court held that a demurrer to a bill in equity cannot introduce, as its support, any facts which do not appear on the face of the bill, and which under the former practice, must be set up by plea or answer.

Equity Rule No. 29, makes no change in this respect. On this point, the rule reads: "Every defence in point of law *arising upon the face of the bill* * * * shall be made by motion to dismiss or in the answer."

In Kansas v. Colorado, 185 U. S. 125 (145), 46 Law Ed. 838 (846) this Court said:

> "The general rule is that the truth of material and relevant matters set forth with requisite precision are admitted by demurrer."

In O'Shaughnessy v. Humes, et al., 129 Fed. 953, an attempt was made to go outside of a general demurrer in order to sustain it. The court classified the demurrer in this respect as a "speaking demurrer" in that it attempted to establish facts extrinsic to the bill. The court held that "a speaking demurrer" or one setting up facts extrinsic to the bill, will always be overruled", for it is defect of form without considering the merits of defense which can only be made by a plea or answer. A speaking demurrer, or one making defense by setting up facts extrinsic to the bill, will always be

overruled because of that infirmity in the demurrer. See cases cited.

See also:

Old Dominion Trust Co. v. First Nat. Bank, 252 Fed. 613, 618;
Alexander v. Fidelity Trust Co., 214 Fed. 495;
Edwards v. Bodkin, 249 Fed. 562;
United States v. Forbes, 259 Fed. 585, 593;
Carl v. Standard C. & C. Co., 202 Fed. 351;
Richardson v. Lorie, 94 Fed. 375, 379;
Stromberg v. Holly Bros., 260 Fed. 222.

We will also state that the majority opinion of the North Dakota Supreme Court filed January 2nd, 1920, in Green et al, v. Frazier, et al, 176 N. W. 11, which sustains the validity of the laws in question in this case closely followed the procedure of the trial judge in this case. That case is prosecuted in the name of four taxpayers. With some exceptions their complaint is a copy of the bill of complaint in the present action. In that case a general demurrer was interposed to the complaint. Following the practice in this case, the majority of the State Supreme Court ignored the allegations of the complaint, and based their conclusion sustaining the validity of the laws in question on matters outside of the record. Their chief reliance was upon the matters recited by the trial judge in this case. (Tr. pages 80, 82.) These are repeated in the majority opinion of the State Supreme Court. (See page 18.) To these imported

and extrinsic matters the majority of the court added other matters wholly foreign to the complaint, and upon these extrinsic matters rested their decision.

If we may assume that the case of Green, et al, v. Frazier, et al, is a bona fide case, and that it is really prosecuted on behalf of the taxpayers of North Dakota, and that it is not a "friendly" or "fictitious" suit, not presenting an actual controversy, as stated by Chief Justice Christianson in his dissenting opinion (see page 25), we have this remarkable situation: The taxpayers of North Dakota as a result of the practice followed in these two cases have had the merits of their claims as to the invalidity of the laws in question summarily disposed of by both the federal court and the state supreme court of North Dakota by their decisions as upon demurrer, which wholly disregarded the allegations of their pleadings, but rested wholly upon issuable matters outside of the record, which were supported by neither allegations or proof. This amounts not only to a denial of justice to the taxpayers of North Dakota, but we believe that it also amounts to a denial of due process in the conduct of the litigation, to which every citizen is entitled.

The trial judge also erred in stating, (Tr. page 80) that the doctrine of Lowell v. Boston, 111 Mass. 454, and similar cases have been swept away by "the real supreme tribunal of Massachusetts, the people of that commonwealth", by adopting a

constitutional amendment in 1917, and that in doing this the people of that state had said to the Supreme Court of that state: "You have been wrong all this half century."

It is true that a sweeping amendment was presented to the convention, (Vol. 1 Debates of Constitutional Convention, page 632), but it was not approved and submitted to the electors. The amendment which was approved, submitted and adopted was known as the 47th Amendment, and reads as follows:

> "The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency, or distress, of a sufficient supply of food and other common necessaries of life and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine."

It is apparent that the justices of the Supreme Judicial Court of Massachusetts consider the rule announced in Lowell v. Boston, supra, still in force in that state. We quote from their opinion in Re Opinion of Justices, April 2nd, 1919, 122 N. E. 763 (766):

> "It is an underlying principle of our government that money raised by taxation can be used only for public purposes and not for the advantage of private individuals.
>
> 'The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the state, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is

> intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object.'" Lowell v. Boston, 111 Mass. 454, 460, 461 (15 Am. Rep. 39).

Second: Why did the state Supreme Court in Green, et al, v. Frazier, et al, 176 N. W. 11, an action supposed to be similar to the one under consideration, uphold the legislation, and what weight shall that decision be given by this Court?

We will first call the attention of this court to the history of that case, first stating that our knowledge as to the case and its history rests entirely upon the files of the Supreme Court of the state and the opinion published in 176 N. W., page 11, under date March 6th, 1920.

That action was commenced in the District Court in the County of Cass in the State of North Dakota on the 15th day of November, 1919, by E. A. Green and three other taxpayers, as plaintiffs, against the same defendants named in the present suit. The complaint was substantially in the language of the bill in the instant case, except, that part of paragraph 22 of the bill of complaint in the case at bar was omitted from the complaint in the State Court, which fact will be further adverted to.

Such proceedings were had after the commencement of the action on November 15th, 1919, that

return was made by the defendants, a change of venue taken from the District Court in and for Cass county to the District Court in and for Burleigh county, and on November 25th, 1919, the order to show cause why an injunction should not issue was argued before the trial judge at Bismarck.

An order was made sustaining the demurrers to the complaint on the day of argument, and thereafter an appeal was taken to the Supreme Court of the State and appellant's brief filed in the office of the Clerk of the Supreme Court on December 17th, 1919. Respondent's brief filed December 24th, 1919. The decision of the Supreme Court handed down January 2nd, 1920.

It is not necessary for us to express our opinion, or to go outside the record to characterize the case in the State Court. The transactions and the time of their taking place as enumerated above, is some indication, but in addition to that, we have the statement of the Chief Justice of the Supreme Court of North Dakota, in which he says:

> "In my opinion this is a so-called friendly or 'fictitious' lawsuit, and does not in fact present an actual controversy. Hence I am agreed that the action should be dismissed. See Chicago, etc., R. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176."

It is apparent from the omission, from the complaint in the State Court, of the allegations contained in paragraph 22 of the bill of complaint in the case at bar, that it was not desired on the part

of those representing the plaintiff in the State Court that there should be presented to that court the facts, circumstances and conditions prevailing in the State of North Dakota.

While there was no allegation in the complaint in the State Court setting forth the actual facts existing with respect to area, population, cities, villages, railway stations, and loading platforms, railways, banks, mills, elevators and general conditions as set forth in par. 22 of our bill, there was a general allegation that the enterprises contemplated did not rest upon public health or welfare of the state or other governmental reasons, but were for the financial benefit and gain of those interested, etc.

In considering the question the State Supreme Court announced a rule by which to distinguish between private and public business.

It defines private business as

> "A business or enterprise in which an INDIVIDUAL OR INDIVIDUALS, AN ASSOCIATION, COPARTNERSHIP, OR PRIVATE CORPORATION, has invested capital, time, attention, labor, and intelligence for the purpose of creating and conducting such business, for the sole purpose that those who make such contributions may from the conducting of such business make, gain, and acquire a financial profit for their exclusive benefit, improvement, and enjoyment and exclusively for their own private purposes. They are not concerned with the public health, safety, morals, or welfare, but are concerned wholly with making a financial profit from the operation of such business for exclusively their own private use and benefit."

It will be noted from the definition as quoted above, that it was evidently in the mind of the court that a private business contemplated private ownership, and the only deduction to be drawn from the definition of private business would be that if a business were carried on by the state then it would be a public business in the judgment of the Supreme Court of North Dakota.

This distinction is made more manifest in a following paragraph wherein the court furnishes a test, by which to distinguish between private and public business, and says:

> "If the industries to be established and which are established are owned and operated by the State in order to promote the general welfare of all the people, and the net profits derived from the operation of such industries become public funds of the State of North Dakota, and payable as such into its treasury for the use and benefit of the State and inhabitants and residents thereof, in like manner as other public funds, THEN IT MUST FOLLOW that the purpose, business, and industries are public."

The theory of the law as announced by the North Dakota Supreme Court is plain. It is in substance and effect, if not in positive terms, simply this: the fact that the profits arising from any business carried on by the state and owned by the state are payable into the State Treasury, there to be used for the benefit of the inhabitants generally, as the general fund in like manner as other public funds, makes of that business, regardless of its characteristics, one that is for a public purpose or a public

use, and is a business for the establishment and maintenance of which money may be raised by taxation.

No other court, so far as we have been able to discover, has ever announced a doctrine so broad as that stated by the Supreme Court of North Dakota, and not only has no other court announced so broad a rule, but the rule thus enunciated by the Supreme Court of North Dakota is contrary to the letter and spirit of the rule to distinguish between public and private purposes as announced by this court and by every state court that has yet had the question before it.

We submit, therefore, that the Supreme Court of North Dakota, at the outset of the consideration of the case then before it, upon the question as to the use of the funds to be raised, either by taxation or that had already been raised, misconceived the rule by which to determine public uses and purposes from those that are private, and hence based its decision upon a misprision.

In further emphasis of the idea pervading the mind of the court, it is said:

> "It must be kept in mind also that the 'Bank of North Dakota', the 'Mill & Elevator Association,' and all other agencies established by the state for the purpose of operating the state industries in question are not PRIVATE CORPORATIONS OR PRIVATE AGENCIES, but are, so to speak, ARMS OF THE SOVEREIGN POWER, THE STATE, reaching out to execute its mandates. When the 'Bank of North Dakota' functions, it does so as an agency of the sovereign power of the State, in like manner as the treasurer

of the State of North Dakota. The same is true of every other state industry which is the subject of this controversy."

We repeat that the Supreme Court of North Dakota, in considering the question of public or private purpose and use, did so on the theory that any business enterprise owned and conducted by the state, the profits of which, if any, were to enter the state treasury as general funds of the state, was established and conducted for a public purpose and a public use, because of the expectation that the prospective increase in state revenues would result in benefit to the people of the state generally and promote the general welfare of the state.

We submit also that the thory so patently held by the Supreme Court of North Dakota is in direct conflict with the theory announced by the Supreme Court of Maine in Loughlin v. Portland, supra, from which this court, in Jones v. Portland, quoted with approval. It is there announced, in unequivocal manner that before an activity is for a public purpose or public use, the subject matter or commodity must be one of public necessity, convenience or welfare, and that in determining the question there must also be taken into consideration the difficulty which individuals have in providing it for themselves. That the purpose of the enterprise must be, not for the sake of indirect gain that may result to purchasers through reduction in price, or incidental benefit to the people of the state, but must be to supply the citizens

with something which is necessary in its absolute sense to the enjoyment of life and health, which could otherwise be obtained with great difficulty.

After thus explaining the reason actuating the court in holding that the activities provided for by the legislation involved were all public, the majority opinion then turns its attention to what it defines as—

> "The reason of the State for entering into the conduct of the industries in controversy."

The court then quotes at length from the opinion of the trial judge in the instant case, reciting those matters that have been already referred to in dealing with the decision of the trial court, each and all of which were wholly without the record, in fact contrary to the positive allegations of the bill of complaint, and brought into the case in utter disregard of settled rules of practice in equity proceedings.

In the case in the state court there was nothing in the pleadings other than in the pleadings in the Federal Court to support the extraneous matters thus brought in; in fact, not so much, because in the state court there had not been served and filed the speaking demurrer encountered in the Federal Court.

After quoting from the opinion of the trial judge in the case at bar, as above indicated, the state supreme court then says:

> "In addition to the clear and concise reasons given by Judge Amidon, there are many others

why the state should engage in the conduct of these industries."

The court then proceeds to relate certain matters, prominent among which it is stated that 90% of the wealth of the State is produced from agriculture.

That the average annual yield of wheat of the state is 125,000,000 bushels.

That there is a spread between No. 1 hard wheat and the lowest grade, of perhaps 20¢, which difference is made to exist on many pretexts.

That the lower grade wheat produces flour of as good grade and quality as the higher grade wheat.

That the only difference between the two grades in certain cases, is a matter of color.

That the loss to the farmers of the state on account of loss in grades and values fixed thereby, amounts to $55,000,000.00 per annum.

That from thirty to forty per cent of the farmers of the state are tenants.

Each and every matter thus set forth is without foundation in the record, and brought into the case by the mere declaration of the writer of the opinion.

We do not intend to go outside the record, even in an effort to follow the Supreme Court of North Dakota, but we feel that we are justified in saying that the matters thus set forth in the opinion of the trial judge, as well as the matters above enumerated and set forth in the opinion of the supreme court of North Dakota are matters which

should be set out by way of defense and with respect to some of which there is a substantial and honest dispute and with respect to others of which there can be no question because the public record, both of the state and government, are attainable and disprove, absolutely, the statements made in the opinion.

With respect to the banking business the supreme court of North Dakota bases its upholding of that enactment, apparently, upon the same principle, viz: that it is a business that will earn profits that will be turned into the state treasury and thus promote the welfare of the state, and in support of that proposition the court tells us that

> "Though the Bank of North Dakota has been in operation less than a period of six months, it has in that short period of time so firmly established itself and so rapidly did its business materialize that it has been enabled to earn net approximately $67,000.00; it has made or has in course of completion over $1,500,000.00 in real estate loans, etc."

We submit that a bank that has been in operation less than six months, and has in that length of time loaned $1,500,000.00 and has accumulated an earning fund of more than $67,000,000, is a profit maker that might cause some envy among other financial institutions, but we contend that there is absolutely nothing either in the act itself or in the language of the Supreme Court from which it can be said that the Bank of North Dakota tends to advance the general welfare of the state in any manner. The only possible chance for

it to be of any benefit to the state or the people of the state is that the profits from the bank are placed in the treasury of the state, there to mingle with the state funds and possibly reduce the tax rate for future years. The act provides nothing further; the Supreme Court in its upholding opinion expresses no hope for anything further.

In dealing with the Home Building Act and the provision for the loaning of $10,000,000.00 upon the farms and real estate within the state for the purpose of securing and providing homes for residents of the state, the Supreme Court of North Dakota makes no attempt to justify the act upon any theory of public purpose announced by any other court. It justifies the act on the principle that the improved financial welfare of a considerable number of people is of such benefit to the state that taxes may be raised and the money expended for the purpose of carrying on the enterprise that will result, or is expected to result in such improved financial condition.

The court speaks of the home as the unit of organized and civilized society; as a miniature government wherein legislative, executive and judicial power is exercised; speaks of the fond recollections with which many consider the home of their youth; speaks of the fact that from 30 to 40 per cent of the farmers of the state are tenants; expresses the idea that if these people had homes which by the exercise of "reasonable effort" and the doing of a "reasonable amount of labor" could

be retained by them, that they would become attached to these homes and would become vitally interested in all that concerned the homes, and thus become vitally interested in the welfare of the state and the nation, and then said that in the opinion of the court the legislature was moved by a spirit to bring about such a condition of home owning and that hence the Home Building Act, which provides for the taking of property by taxation and by eminent domain from A for the purpose of turning it over to B is a constitutional enactment, even under the provisions of the 14th Amendment.

We present this brief analysis of the opinion of the Supreme Court of North Dakota, not in any sense as a criticism of the intent or purpose of the court, but in an effort to show to this court that the Supreme Court of North Dakota entirely misconceived the rule of law by which to determine whether a given purpose was public or private, and labored under a mistaken idea as to what constituted general welfare and as to where the line of demarcation lay as between incidental and direct benefits to the public.

We also suggest that the Supreme Court of North Dakota was mistaken in another matter.

It is apparent from the opinion of the court that in rendering the opinion in the Green case, supra, the court believed that it was laying down a rule to be accepted by this court, for in the opinion it is said:

"In deciding, as we have supra, that the state ownership and construction of elevators and mills, the creating of the Bank of North Dakota, and the authorizing and issuing of all the bonds in question are for a public use, for which the legislature may authorize the levying and collecting of a tax on the property within this state, it is clear by the highest authority that the decision of this court will be accepted and accorded the highest respect, if properly based upon merits and the provisions of the state constitution under consideration, and the laws in question are not contrary to the provisions of the federal constitution, and we hold they are not; for this court is presumed to be in better position to know the conditions existing in the State affecting the matters in controversy, and is more favorably situated to acquire accurate information in that regard."

There is no question but that the Supreme Court of a state is in better position to know of those facts that are properly brought before it, than a court far removed from the state, but that rule does not contemplate that a state court may go outside of the record and bring in extrinsic and issuable matters upon which to base an opinion. Having so brought into the case extrinsic and issuable matters as the basis for its opinion, we submit that the decision of the Supreme Court of the State of North Dakota is entitled to no weight in determining whether the taxes required to carry out the provisions of these different legislative enactments are for a public purpose.

The banking business and the mill and elevator business as authorized and provided for in the laws under consideration, each, is in all of its essential characteristics, a purely commercial, competitive business. There is nothing in either the business of banking or milling that makes it one in which all of the public have a right to share. Even conceding that the banking business might be so carried on that a lower rate of interest could be given to those who have the security necessary to borrow from the bank, or conceding that the operation of the mill and elevator association might result in changing in some respects the grade of certain grains, or in keeping within the state some by-products that are not now so kept, yet neither business is such a one that it concerns the welfare and convenience of all of the inhabitants of the state. Neither business is such that it cannot be successfully dealt with and its benefits brought to the people without the aid of the powers derived from the legislature. (Laughlin v. Portland, 111 Maine, 486; 90 Atl. 318.) There is nothing in either business that will enable the citizen to be supplied with something which is necessary in its absolute sense to the enjoyment of life and health, which could otherwise be obtained with great difficulty, and at times perhaps not at all, and whose absence would endanger the community as a whole. (Jones v. Portland, 245 U. S. 217.)

There is absolutely nothing about the carrying
n of either the banking or the mill and elevator
usiness from which it can be said that the state is
ttempting to provide any necessity of life at cost
o the inhabitants of the state.

It is true, as was said by Mr. Justice Peckham,
n Clark v. Nash, 198 U. S. 361, (369); 49 L. Ed.
085, that a public use may frequently and largely
epend upon the facts surrounding the subject, but
here is nothing in this case to indicate in any man-
er that any service to be rendered by either the
ank or mill and elevator is a service tending to
he welfare of all the inhabitants or one that can-
ot be successfully dealt with without the aid of
he legislative power. There are no benefits con-
erred by either of these businesses that cannot be
ecured through private channels, but on the con-
rary, the allegations of our bill show that all of
hese things are supplied.

The Court in Clark v. Nash, supra, page 369,
aid:

> "But we do not desire to be understood by this decision as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the state. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary

to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained."

Home Building Act.

When we consider the Home Building Act we are dealing with a class of business that has less of public purpose involved than either the bank or mill and elevator business.

The Justices of the Supreme Judicial Court of Massachusetts, In re Opinion of the Justices, 211 Mass. 625; 98 N. E. 611, (612, 614), having before them the question of the constitutionality of an act authorizing the state to purchase land, build upon and rent, manage and sell the same, stated the law applicable to such proposed enactment in very apt and forcible language. They said:

> "The substance of it (the law) is that the Commonwealth is to go into the business of furnishing homes for people who have money enough to pay rent and ultimately to become purchasers. It is not a plan for pauper relief."

Then taking up the question of public use, the Court said:

> "To this fundamental test must be brought all governmental activity in every system based upon reason, rather than force. The dominating design of a statute requiring the use of public funds must be the promotion of public interest and not the furtherance of the advantage of individuals. However beneficial in a general or popular sense it may be that private interest should prosper and thus in-

cidentally serve the public, the expenditure of public money to this end is not justified."

Speaking further of the subject there involved, the Justices quoted with approval from Lowell v. Boston, 11 Mass. 454, as follows:

> "The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object."

Proceeding, the Justices said:

> "Buying and selling land always has been freely exercised by all individuals who desired, under the Constitution. Proprietorship of his own home has been one of the chief elements of strength in the citizen, and widely diffused land ownership has conferred stability upon the state. It is a matter of common knowledge that thousands of inhabitants of the commonwealth who are "mechanics, laborers or other wage-earners" have become, through industry, temperance and frugality, owners of the homes in which they dwell. These proprietors, however humble may be their houses, cannot be taxed for the purpose of enabling the state to aid others in acquiring a home whose temperament, environment or habits have heretofore prevented them from attaining a like position. Although eminent domain differs from taxation in the occasion and manner of its exercise, it rests for its justification upon the same basic principle of public necessity. If this be held to be a public purpose, it would be lawful to authorize the commission to exercise the power of eminent domain. This would mean that the home of one wage-earner might be taken by the power of the commonwealth for the purpose of handing it over to

> another wage-earner. Neither the power of taxation nor of eminent domain goes to this extent."

In the acts under consideration in the instant case the right of eminent domain, as well as the right of taxation, is granted, and it is possible in either instance, and particularly in the Home Building Act, to do just exactly that thing that the Justices of the Supreme Court of Massachusetts held could not be done.

There exists no power to enforce such an enactment, for as said by Mr. Justice Miller, in City Savings & Loan Assn. v. Topeka, supra:

> "No court would hesitate to adjudge void any statute declaring that the homestead now owned by "A" should no longer be his, but should henceforth be the property of 'B.'" (See also Chicago B. & Q. v. Chicago, 166 U. S., 226, (237); 41 L. Ed. 979 (985).

It is recognized as a fundamental principle that a state is simply a political unit and not a business corporation, except incidentally to further its political purposes. In its organization and machinery it is not adapted to acquire, own, manage, or make a profit out of lands or other property, except for public use.

> In re Opinion of Justices (Maine), 106 Atl. 863 (871).

And in determining what is a public use the question is not whether the thing can be done economically, but whether the doing of it falls within the legitimate functions of government.

Facts as Shown by the Bill.

Thus far we have discussed the question of public purpose from the standpoint of the provisions of the legislative acts themselves and without reference to the state conditions as alleged in our bill and admitted by the motions.

We desire at this time to take up that particular phase of the question.

In paragraph 22 of our bill, the plaintiffs, for the purpose of showing that the expenditure of public funds and the creation of the public debts complained of, are not based upon the public health or welfare of the people of the state or any other governmental reason that would justify the proposed expenditure or creation of debts, set forth facts to show that no condition existed in the state of North Dakota which would authorize or justify the state in the exercise of its legitimate functions of government, in engaging in the various lines of private business contemplated.

It is set forth that North Dakota has an area of 79,837 square miles and a population, according to the war census of 664,625; it has 53 counties, each of which is served by one or more of six railroads whose total mileage, including main line and branch line trackage is 6295 miles.

On the lines of its several railroads are more than 250 incorporated cities and villages and numerous unincorporated hamlets, and altogether

1,000 railroad stations or sidings, where freight and merchandise is loaded and unloaded, with numerous privately owned general stores where merchandise and food products, including flour and all of the necessities of life, are kept for sale and sold.

It has 74 flour mills in operation, which are scattered over the various parts of the state, with a capacity varying from 25 to 1800 barrels per day, and a total capacity of 16,720 barrels a day, or 5,000,000 barrels capacity for a year. The mills thus privately owned and operated have a capacity of producing between 7 and 8 times more flour than the people of North Dakota consume and after feeding all of the people of the state, there must be exported from the state over 4,000,000 barrels of flour per year.

These facts are uncontroverted. They are admitted by the motion to dismiss. They stand today before the court admitted as the facts because they cannot be denied. We ask in all earnestness how, with a mill capacity feeding all the people of the state, with 74 flour mills scattered throughout 53 counties, with an export flour product of more than 4,000,000 barrels per year, can it be said, that the establishment of a mill is supplying any need of the government or is furnishing any facility for its citizens, which is not amply provided for in the regular and ordinary course of private business.

There is nothing about the "Mill and Elevator Association Act" that even remotely suggests the

grist mill of the early days with the obligation resting upon the proprietor to grind for and serve all without discrimination, and a community entirely dependent upon that local service to turn its crop into food.

On the contrary, the facts disclosed by the record as above referred to, show a state thoroughly well supplied with mills manufacturing more flour than the people of the state can use, in fact, making of us an export state to the extent of more than 4,000,000 barrels per annum.

Then again the Act provides for a system of warehouses, elevators, flour mills, factories, plants, machinery and equipment to carry on the business of manufacturing farm products, with full power to deal in these commodities even as a private person and to establish exchanges, bureaus, markets and agencies anywhere in the world. (Tr. 40-41.)

Between the old grist mill and the business provided for under the "Mill and Elevator Association Act" there is nothing in common, except that wheat was to be ground in the first and may be in the second.

The first was a community service. The second is a great system of commerce and trade, which may become world-wide and involve any and all kinds of mills, factories, plants and warehouses to deal in and carry on the manufacture of any and all farm products and by-products.

For instance:

Terminal Grain Elevators,

Warehouses and Local Elevators.

Flour Mills,

Flax Mills,

Tow Mills, Lindseed Oil Mills, Oatmeal Mills, Packing Plants, Canneries—and such other businesses as may be desired may be established anywhere in the United States. In addition to which there may be established anywhere in the world, Exchanges, Bureaus and Agencies for the purpose of furthering and carrying on the business authorized.

Can there be any question as to the character of the business authorized? We contend not, and submit that the purpose is esentially private.

With respect to the elevators it is shown in the bill that there are more than 2,000 licensed and privately owned warehouses and elevators located at railroad stations in the several counties of the state with a total capacity for storing grain of more than 60,000,000 bushels. The opinion of the Supreme Court of this state gives the maximum yield of 125,000,000 bushels, so if that be true, we have in the state a storage capacity for approximately one-half of the maximum yield, of the state, and three-fourths of the average yield.

All people understand the movement of grain. It is not stored either in North Dakota or in Minnesota or any other western state. It is continually being moved forward and these elevators with

this great capacity have been able and will be able to handle all the grain of the state.

There are in the state 706 state and national banks, with capital and surplus ranging from $10,000.00 to $560,000.00; there are a large number of loan and trust companies and numerous loan agencies specializing in making loans on farm lands, and individual loan agencies are distributed throughout the state and in each and every county thereof, in addition to which it has a great number of building and loan associations specializing in making loans upon city property.

In addition to the numerous banks and loan agencies we have operating in this state the Federal Land Bank, loaning upon farm property.

North Dakota has an area of 40,000,000 acres; more than one-half is unbroken prairie used for grazing and stock raising, and a large proportion of the tax payers of the state, who are the owners of a large part of the taxable property of the state, are in no manner interested in any of the business enterprises or projects authorized by this legislation.

These facts were not presented to the State Court, but are all before this Court. Therefore, in passing upon these questions and in determining whether or not these proposed enterprises are for a public purpose, this court has before it certain

facts, circumstances and conditions that were not presented to the state court.

The facts thus presented to this court and which were not presented to the state court are important, and we submit that the decision of the state court given without a consideration of the state conditions, as set forth in our bill, cannot be of any benefit to this court in the case at bar and is entitled to no weight.

On June 6th, 1919, seven justices of the Supreme Judicial Court of Maine, some of whom were the same justices who joined in the opinion in the case of Laughlin v. Portland, supra, delivered an answer to certain questions submitted by the Legislature, and their opinion is reported as In re Opinion of the Justices in 106 Atl. 865.

Speaking of a constitutional provision of Maine granting to the legislature full power to make and establish all reasonable laws, etc., the Court said:

> "The established construction of this provision as to the scope of legislative powers governing taxation is that the purpose for which the taxes are raised must be one which is admitted in law to be just and reasonable, and proper for government to carry out. It must be in the exercise of a governmental function. The state cannot enter upon a commercial enterprise, however alluring the prospect, and tax the people for its promotion."

After enunciating the principle above the court proceeds:

"The decisions in Laughlin v. City of Portland, 111 Me. 486; 90 Atl. 318, and Jones v. Portland, 113 Me. 124; 93 Atl. 41, subsequently affirmed by the Supreme Court of the United States (245 U. S. 217; 62 L. Ed. 252), in no way conflict with this principle. In those cases a Municipal Fuel Yard Act (R. S. c. 4, § 64) was held to be within the power of the Legislature on the ground that it enables our citizens to be supplied with fuel, which is a necessity in its absolute sense to the enjoyment of life and health, and which could otherwise be obtained with great difficulty and at times perhaps not at all, and whose want would endanger the community as a whole. The elements of commercial enterprise or pecuniary benefits to the municipaltiy either direct or indirect were entirely lacking. In fact, they were expressly prohibited by the statuee under consideration which compelled the furnishing of fuel by municipalities at cost. That decision was in line with the general rule laid down by Judge Cooley in his work on Constitutional Limitations when he declares that 'if the object is to furnish facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which on account of their peculiar character, and the difficulty, and perhaps impossibility, of making provisions for them otherwise, it is alike proper, useful, and needful for the government to provide', then taxes may be levied to provide these facilities."

The justices in their opinion, page 872, reiterate the rule that we have contended for in this argument, viz:

"Public benefit or interest are not synonymous with public use. * * * Neither mere

public convenience nor mere public welfare will justify the exercise of the right of eminent domain.

* * * If the doctrine of public utility were adopted to its fullest extent, there would practically be no limit upon the exercise of this power. Property is devoted to public use when and only when the use is one which the public in its organized capacity, to-wit, the state, has the right to create and maintain, and therefore one in which all the public has a right to demand and share in. * * * It must be more than a mere theoretical right to use. It must be an actual, effectual right to use."

It is frequently urged by those who are advocating enlarged powers of government, that times have changed, and that governmental functions are not today what they were a few years ago. That the principles governing the rights of governments in dealing with the citizen have been enlarged in their scope.

We cannot agree with the suggestion. We believe that principles are the same today that they were when written into the constitution. We recognize, however, that changing conditions and the legitimate growth of the common law brings about the application of established principles of law to a new set of facts.

Thus it is that the courts have approved of laws extending the power of taxation and of eminent domain to cases involving:

Light, Heat, Water, Drainage, Irrigation, Sewerage, Cemeteries, Parks and Recreational places, each and every activity furnishing something to

the people that promoted general welfare and, for some reason could be much better furnished by the government than by private enterprises. Through all the cases there runs the suggestion that there is a line beyond which the state cannot go, which line while sometimes dim and uncertain, is clear and certain when run along the field of trade and commerce and especially so when such trade or commerce is carried on for profit.

A determined effort is being made in North Dakota, not to reconcile a new set of facts with established legal or governmental principles, but to so enlarge the power of the state, that the inherent rights of the citizens shall be destroyed, and the authority of unlimited and uncontrolled majority rule established.

Such action is violative of the Fourteenth Amendment to the Constitution of the United States.

We contend, therefore, that:

The Judgment of the Trial Court Should be Reversed.

Respectfully submitted,

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